88-1677

No. .....

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

RONNIE O. KITCHENS, et al.,
Petitioners,

v.

STATE OF OREGON, EX REL ADULT AND FAMILY SERVICES DIVISION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

PHILIP FREDERICK SCHUSTER, II
Counsel of Record
ROGER FREDRICK DIERKING
Counsel for Petitioners
1500 N.E. Irving Street, Suite 540
Portland, OR 97232
(503) 231-7765

April 7, 1989.

STEVENS-NESS LAW PUB. CO., PORTLAND, OR 97204 824

QUESTIONS PRESENTED

1. Does the State of Oregon violate the Fourteenth Amendment Due Process and Equal Protection clauses by withholding notice of Title IV-A AFDC assistance proceedings from putative fathers, consequently both keeping secret from putative fathers the state's intention to establish their paternity and support obligations and discouraging putative fathers from timely exercising their rights?

2. Does the State of Oregon violate the Fourteenth Amendment Due Process rights of putative fathers by requiring paternity to be established in every Title IV-D AFDC filiation proceeding without giving putative fathers the opportunity to invoke the trial court's consideration of evidence as to whether or not the establishment of paternity is consistent with the welfare child's best interests?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioner in the circuit court cases was the appellant in the Court of Appeals of the State of Oregon. The named petitioner in all three consolidated cases was:

State of Oregon, ex rel Adult and Family Services Division.

The respondents in the circuit court cases were the respondents in the Court of Appeals of the State of Oregon. The named respondents in the consolidated cases, entitled State ex rel AFSD v. Kitchens, were:

Ronnie Oscar Kitchens
John Frank Moore
Robert W. Dickinson

American Civil Liberties Union Foundation of Oregon, Inc. appeared amicus curiae before the Supreme Court of the State of Oregon on respondents' petition for review.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONNIE OSCAR KITCHENS, et al., Petitioners,

v.

STATE OF OREGON, ex rel ADULT AND FAMILY SERVICES DIVISION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

The petitioners, Ronnie Oscar Kitchens, John Frank Moore and Robert W. Dickinson, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon, entered in the above-entitled proceeding on November 2, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon is reported at 93

Or. App. 685, 763 P.2d 1196 (1988), and is reprinted in Appendix A hereto.

The order denying reconsideration by the Court of Appeals is reported at 94 Or. App. ___, ___ P.2d ___ (1988), and is reprinted in Appendix A hereto.

The order of the Supreme Court of the State of Oregon denying review is recorded at 307 Or. 340, ___ P.2d ___ (1989) and is reprinted in Appendix A hereto.

The memorandum orders, granting summary judgment and dismissal, and the judgment orders in the circuit court of the State of Oregon for the county of Multnomah (Mercedes F. Deiz, Judge) have not been reported. They are reprinted in Exhibit B hereto.

JURISDICTION

The petitioners (hereinafter referred to as "putative fathers") interposed, at

the trial court, certain federal constitutional and factual claims and defenses to three Title IV-D State initiated filiation proceedings brought by the State of Oregon. On September 22, 1986, the Oregon trial court granted summary judgment for putative fathers in the consolidated cases of John Frank Moore and Robert W. Dickinson and entered judgment for putative fathers in those consolidated cases on October 27, 1986. On October 27, 1986 the trial judge granted summary judgment in favor of putative father Ronnie O. Kitchens and entered judgment in favor of Mr. Kitchens.

The State of Oregon, through Adult and Family Services Division (AFSD), filed timely appeals to the Court of Appeals in all three cases. On April 6, 1987, all three cases were consolidated for appeal.

On appeal, the Court of Appeals, on November 2, 1988, entered an opinion reversing and remanding the judgments and orders of the trial court in the three cases. These putative fathers then filed their timely petition for review. The Court of Appeals entered an order denying reconsideration on December 23, 1988. The Supreme Court of the State of Oregon, on January 31, 1989, entered an order denying review of all three cases.

The jurisdiction of this Court to review the judgment of the Court of Appeals of the State of Oregon is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment of the United States Constitution, the Aid to Families with Dependent Children (AFDC) Act, 42 U.S.C.

§§ 601 and 602(a)(7)(A), (26)(B), the Child Support Enforcement (CSE) Act, 42 U.S.C. §§ 654(4)(A), 666(a)(5) and the pertinent regulations implementing the AFDC and CSE Acts, 45 CFR §§ 232.11(a)(1), 232.12(a)(1)(2), 232.42, 232.45(c), 302.31(a)(1)(2), 303.5(a)(b), 305.24(b), as well as the applicable Oregon Revised Statutes, ORS 109.010, 109.060, 109.070(1)(3)(5), 109.092, 109.125(1)(b)(e), 109.155(1)(4), 109.175, 418.042, 418.045(1)(a), 418.130, are set forth in App. D, infra, App. D-1 to D-17.

STATEMENT OF THE CASE

The petitioners, putative fathers Ronnie Oscar Kitchens, John Frank Moore, and Robert W. Dickinson, were identified pursuant to ORS 418.042 as fathers of children born out-of-wedlock by the children's mothers in AFSD Title IV-A Aid

to Families with Dependent Children ("AFDC") proceedings. 42 U.S.C. §§ 602(a)(26)(B).

Years later, without having given notice to these putative fathers at the Title IV-A stage, AFSD filed filiation proceedings pursuant to ORS 109.125(1)(b) in the Oregon circuit courts in accordance with the Title IV-D Child Support Enforcement (CSE) program, 42 U.S.C. §§654(4)(A).

In the Ronnie Oscar Kitchens case, the child was born September 13, 1982. AFSD filed filiation proceedings in May, 1985 to establish paternity and collect support in the amount of $10,016.42 plus birth costs. There had been no associations between the child and Mr. Kitchens. The child's mother, in depositions, indicated that her present husband wished to

adopt the child born out-of-wedlock, and that she felt it was in the child's best interests to continue to have no association with Mr. Kitchens.

In the John Frank Moore case, the child was born on July 31, 1974. AFSD granted assistance for support of the child in 1974 but did not file Title IV-D filiation proceedings until January, 1985 to establish paternity and collect support in the amount of $10,856 plus birth costs. There had been no association between the child and Mr. Moore.

In the Robert W. Dickinson case, the child was born on October 13, 1981. AFSD filed filiation proceedings in March, 1985 to establish paternity and collect support in the amount of $7,176 plus birth costs. There had been no associations between the child and Mr. Dickinson.

These putative fathers raised constitutional and factual defenses in their responses to AFSD's filiation proceedings to establish paternity and collect support. The putative fathers filed motions for summary judgment in each case. The responses and motions for summary judgment alleged that the failure of the State to send them notice of the Title IV-A proceedings violated their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution, and resulted in a substantial passage of time without associations between the putative fathers and the out-of-wedlock children. The responses and motions for summary judgment alleged that establishment of paternity under these circumstances would jeopardize the stability of the out-of-wedlock

children and that establishment of paternity should, therefore, be barred. Putative fathers' motions for summary judgment incorporated the opinion of a leading child welfare expert, Dr. Arthur C. Emlen. The essence of Dr. Arthur Emlen's opinion was that:

> "...[f]or the state to fail to settle the issue of a parent-child relationship at the first instance, when assistance is provided, is detrimental to the child and promotes instability in family relationships." (App C-4/5)

In a concurrent federal court proceeding initiated by the putative fathers, the Ninth Circuit Court of Appeals held that the putative fathers had no Fifth Amendment claim to notice of Title IV-A proceedings. As to the putative fathers' Fourteenth Amendment claim to Title IV-A notice, the Ninth Circuit Court affirmed the District

Court's dismissal of the action under the Younger abstention doctrine. The Court held that the Fourteenth Amendment claims involved matters of state interest and that the putative fathers had an adequate opportunity to raise their federal constitutional claims in the state court proceedings. Kitchens v. Bowen, 825 F.2d 1337, 1341-42 (9th Cir. 1987) cert. denied, 108 S.Ct. 1109 (1988).

In the ongoing State of Oregon circuit court proceedings, the Dickinson and Moore cases were consolidated. The Kitchens case was prosecuted separately. Putative fathers' responses and motions for summary judgment filed in the state court proceedings incorporated all claims raised by them in the federal court proceedings.

In the trial court proceedings on putative fathers' motions for summary judgment, the trial court found no genuine issue as to any material fact relating to the status of these putative fathers. The trial court found that the applicant mothers had designated each of them "as the fathers when they applied for assistance or shortly thereafter." (App B-3, 9). The trial court found that the state did not, indeed, notify the putative fathers when the mothers applied for Title IV-A assistance and held that "the lack of notice has deprived [each putative father] of his guarantees to due process and equal protection under the Fourteenth Amendment of the United States Constitution...," and dismissed each action. (App B-4, 10). Underpinning the trial court's dismissal of each of these filiation proceedings was

the court's finding that "(a) substantial period of time elapsed with no association between the (putative father) and the child born out of wedlock." (App B-3, 9, 10).

The Oregon Court of Appeals held, however, that the issue of paternity is material in each case. This holding was based upon three assertions by the court. First, the court, using a standing analysis, held that "[putative fathers] may not invoke claims of other persons who might be fathers." (App A-13). Secondly, the court held that "if the [putative father] is not in fact a father, AFSD's failure to inform him to the contrary could not have deprived him of liberty or property under the Due Process Clause (sic) of equal protection or of any privilege or immunity under Article I,

Section 20, of the Oregon Constitution." (App A-11, 12). Third, the court held that "the [trial] court should not bar AFSD from seeking to determine at trial the factual question -- paternity -- which brings into play [putative fathers'] claims." (App A-13).

Review of the Oregon Court of Appeals' decision was denied on January 31, 1989 by the Oregon Supreme Court without comment. (App A-1). Putative fathers' petition for review before the Oregon Supreme Court reiterated the putative fathers' federal due process and equal protection claims. They also asserted that the Oregon Court of Appeals' holding was contrary to federal and state standards for establishment of paternity consistent with the child's best interests. Finally, they asserted that

the Oregon Court of Appeals' ruling, denying them the opportunity to assert constitutional claims as defenses to the AFSD's filiation proceedings, constituted a denial of procedural due process.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

This is a case of first impression in the nation which deserves resolution by this Court because it deals with the discretion of a state to suspend, indefinitely, the constitutional rights of thousands of its citizens. In a radical departure from accepted legal norms, the Oregon Court of Appeals has ruled that putative fathers, as U.S. citizens, lack basic constitutional rights -- the right to be notified by the state when the state first links these putative fathers with the out-of-wedlock children. The court's

rationale is that putative fathers, as such, have no constitutional rights until their biological paternity is established at the Title IV-D stage. The decision also prevents putative fathers from raising circumstances at the Title IV-D stage which evidence that establishment of paternity may not be consistent with the child's best interests.

Because pregnant mothers may opt to either rear their out-of-wedlock children separate and apart from putative fathers, Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977), or obtain an abortion, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), putative fathers' rights to make decisions concerning these children are suspended until their birth. Then, at the Title IV-A stage, states such as Oregon may now hold

their rights in limbo indefinitely by withholding Title IV-A notice, keeping the Title IV-A proceedings secret. And then, many years later, with no time limitations whatsoever, 42 U.S.C. § 666(a)(5); 45 CFR § 305.24(b); Clark v. Jeter, 108 S.Ct. 1910 (1988), these states may initiate Title IV-D filiation proceedings, when most convenient to the states and with the greatest disadvantage to putative fathers and inconvenience to welfare families and children. Through these delays, and the withholding of Title IV-A notice, states may suppress information from putative fathers in such manner that they are not encouraged to seek timely legal advice. This means that they may, as has happened to these putative fathers, lose the opportunity to assume their responsibilities as parents in a timely fashion.

Finally, as if to burden and further alienate these unwed fathers, trial courts at the Title IV-D stage may impose judgments against these fathers requiring them to pay thousands of dollars for support which has accrued during the pre-notice period. Once the state has established paternity in this manner, the damage cannot be undone. Any hope of uniting or bonding these unwed fathers with their children is irretrievably lost, for no good reason. And judicial review to correct these injustices is precluded by the Oregon Court of Appeals' ruling.

The power of the state, to exclude putative fathers from state processes affecting the welfare family, must be brought within Fourteenth Amendment constraints by this Court. Only then will the Fourteenth Amendment rights of citi-

zens, including members of the welfare family, be preserved.

II. THE CONFLICTS ARE SUBSTANTIAL.

The Oregon Court of Appeals' ruling is in direct conflict with a ruling of the Ninth Circuit Court of Appeals. The Ninth Circuit adopted the argument of the State of Oregon that the putative fathers, as such, "have an adequate opportunity to raise their federal constitutional claims in the state court proceedings" and applied the Younger abstention doctrine in dismissing their federal constitutional claims. Kitchens v. Bowen, supra, 825 F.2d at 1342. But the Oregon Court of Appeals, cognizant as it was of the Ninth Circuit's holding, held just the opposite: that putative fathers, as such, have no opportunity to raise federal constitutional claims.

Putative fathers' constitutional claims relate to the loss of their ability to parent the out-of-wedlock children due to the lack of Title IV-A notice. Putative fathers' constitutional and factual claims in Title IV-D proceedings concern circumstances which would not make establishment of paternity in the child's best interests. But the Oregon Court of Appeals held that only adjudicated fathers, and not putative fathers, may raise these claims. Thus, a determination of paternity, first, without consideration of these claims, which are relevant to the determination of paternity itself, simply means that putative fathers are denied a meaningful opportunity to raise the very federal constitutional claims in state court that the Ninth Circuit assumed they had an opportunity to raise. These puta-

tive fathers request this Court to determine their rights as putative fathers to meaningfully assert these claims during the adjudication of paternity -- an issue left undetermined by both the Ninth Circuit and the Oregon Court of Appeals.

Most importantly, however, the Oregon Court of Appeals' decision directly conflicts with decisions of this Court which have held that putative fathers have rights to assert federal constitutional claims. In Stanley v. Illinois, 405 U.S. 645 (1972), this Court held that a putative father had the right to question the constitutional validity of the State of Illinois dependency proceedings which summarily terminated his parental rights, even though the State of Illinois refused to label this putative father as a "legal parent", and even though this putative

father failed to mitigate his injury or formalize his status by seeking custody of the children through guardianship or adoption proceedings. Stanley v. Illinois, supra 405 U.S. at 647-650.

In Lehr v. Robertson, 463 U.S. 248 (1983), this Court again recognized that a determination of biological paternity was not a prerequisite to examining whether the statutory scheme complied with the requirements of due process. A determination of biological paternity was never made in Lehr, and, in fact, the mother contended that the putative father was not the biological father. 463 U.S. at 250, n. 3.

Thus, the "issue of fact" found by the Oregon Court of Appeals was also present in Stanley and Lehr. Rather than remanding for a resolution of this factual

issue, this Court simply assumed for purposes of its analysis that the putative father was in fact the biological father. Here, even stronger reason exists for this Court to recognize the putative fathers' status, because the state is attempting to create, rather than sever, the parent-child relationship.

The Oregon Court of Appeals' decision, in holding that putative fathers "may not invoke claims of other persons who might be fathers..." (App A-13), creates yet another conflict with this Court's doctrine of "jus tertii". The court ignores this additional basis upon which putative fathers may assert their constitutional claims. See, Singleton v. Wulff, 428 U.S. 106, 114-116 (1976); Craig v. Boren, 429 U.S. 190, 193-194 (1976) rehearing denied 429 U.S. 1124 (1976);

National Association for Advancement of Colored People v. State of Alabama, 357 U.S. 449, 459 (1958). Here, a substantial relationship exists between putative fathers and biological fathers, as both suffer injuries, either actual or threatened, from the failure of the state to notify them of the Title IV-A application for assistance proceeding and later targeting them for simplified Title IV-D filiation proceedings. They both have a stake in the outcome of these proceedings. Putative fathers as well as biological fathers are also precluded, forever, by the State of Oregon from meaningfully asserting their federal constitutional rights. Finally, a need exists to avoid dilution of the rights of biological fathers that would otherwise result.

Furthermore, the Oregon Court of Appeals' decision also directly conflicts with federal statutes and regulations and the intent of Congress which mandate that paternity must be expeditiously established within the context of the AFDC program, consistent with the child's best interests. 42 U.S.C. §§ 602(a)(26)(B); 654(4)(A); 45 CFR §§ 232.42, 232.45(c), 302.31(a)(1)(2), 303.5(a)(1)(2)(b); S.Report 93-1356, 93rd Cong. 2d Sess. 8133, 8154-8155 (1974).

For example, the Oregon Court of Appeals ruling would preclude Mr. Kitchens, in the trial court below, from presenting the fact that the child's stepfather wishes to adopt the child and that the child's mother feels that it would not be in the child's best interest to have any contact with Mr. Kitchens. The shock,

emotional trauma and humiliation faced by the mother and child in this set of circumstances may preclude establishment of paternity under the federal regulations. 45 CFR §§ 232.42; 303.5(b).

In addition to conflicting with the federal AFDC standards precluding establishment of paternity, the Oregon Court of Appeals' holding also conflicts with an emerging, modern trend in state jurisdictions which has redefined the purpose of filiation proceedings.

The court's holding, by precluding putative fathers from raising federal constitutional defenses to filiation proceedings, creates an irrebuttable presumption that an adjudication of paternity is always in the best interests of the child. This irrebuttable presumption is in direct conflict with state jurisdictions which

hold that such a presumption is legally incorrect. See, e.g., In re Paternity of D.L.H., 142 Wis.2d 606, 419 N.W.2d 283, 286 (1987); McDaniels v. Carlson, 108 Wash.2d 299, 738 P.2d 254 (1987). As the Washington Supreme Court explained:

> "A paternity suit, by its very nature, threatens the stability of the child's world. * * * It may be true that a child's interests are generally served by accurate, as opposed to inaccurate or stipulated, paternity determinations. (citations omitted) However, it is possible that in some circumstances the child's interests will be even better served by no paternity determination at all. (citations omitted) The best interests of the child standard does not entitle the court to presume that paternity determination is automatically in the child's best interest." McDaniels v. Carlson, supra, 738 P.2d at 621 (emphasis added).

There is an established principle throughout the United States that the object of a paternity determination is the welfare of the child and the child's best interests:

> "'The old conception of paternity proceedings as being designed chiefly to spare the public the expense of supporting the child has been replaced by a more enlightened view. Courts now hold that the chief purpose of the paternity proceeding is to secure the health, welfare and happiness of the child. The best interests of the child have been established as the paramount criteria for determining the relationship between the child and his biological parents.'" Ettore I. v. Angela D., 127 A.D.2d, 6, 513 N.Y.S.2d 733, 739 (1987).

This Court has also adopted the view that the "best interests of the child" standard is appropriately applied in proceedings involving the status of a child born out-of-wedlock. See, e.g., Quilloin v. Walcott, 434 U.S. 246, 254-255 (1978).

Furthermore, most state jurisdictions, in private filiation proceedings, allow parties to assert defenses such as equitable estoppel, as well as consideration of the best interests of the child, to reject untimely filiation proceedings

which threaten to introduce a stranger into the child's life. See, e.g., In re Paternity of D.L.H., supra; McDaniels v. Carlson, supra; Markert v. Behm, ___ Minn App ____, 394 N.W.2d 239, 244 (1986); P.B.C. v. B.H., 396 Mass. 68, 483 N.E.2d 1094, 1097-98 (1985); Michelle W. v. Ronald W., 39 Cal.3d 354, 216 Cal. Rptr. 748, 703 P.2d 88, 93 (1985); A v. X,Y,&Z, ___ Wyo ___, 641 P.2d 1222, 1225, 1227 (1982); Happel v. Mecklenburger, 101 Ill. App.3d 107, 56 Ill. Dec. 569, 427 N.E.2d 974, 983 (1981). Some of these cases deal with the rights of putative fathers to bring filiation proceedings where the children have been statutorily presumed legitimate. This Court now has before it such a case. Michael H. v. Gerald D., 191 Cal. App.3d 995, 236 Cal. Rptr. 810 (1987)

cert granted (Docket No. 87-746, 1987 October Term).

Two justices of the Oregon Supreme Court recently observed that Oregon's Title IV-D procedures are chiefly deficient because the child's best interests are given no consideration in Title IV-D proceedings. Since the child is not made a party to the proceeding, the proceedings, seeking to introduce a stranger into the welfare family, "may humiliate (the mother) and the child and destroy existing relationships." State of Oregon ex rel AFSD v. Tuttle, 304 Or 270, 744 P.2d 990, 992 (1987) (J. Linde and Gillette, concurring). And Dr. Emlen, a child welfare expert, also concludes that delayed state action in relating a putative father with his out-of-wedlock child creates "conflict

and confusion regarding what that relationship represents." (App C-4).

All of the above-noted conflicts have major implications for the accomplishment of the goals of the Social Security, AFDC program, which seeks to assist dependent children while creating parent-child bonds. 42 U.S.C. §§ 601. The conflicts present questions of first impression for determination by this Court.

III. THE ISSUES HAVE NATIONAL IMPORTANCE

Of national importance is the power of the state to exercise its discretion in holding in abeyance and restricting the constitutional rights of hundreds of thousands of its citizens involved in a cooperative federal-state Social Security AFDC program designed to assist needy children. In expanding the state's discretionary power, the Oregon Court of

Appeals has held that putative fathers, as such, have no constitutional rights to Title IV-A notice. Important considerations, such as the needy child's best interests, have been totally subordinated to the state's interest in collecting money. The exercise of the state's power in this manner becomes detrimental to the harmonious functioning of the Social Security AFDC program itself.

Of equal national importance is the need for this Court's further definition of the constitutional rights of putative fathers. This Court has formulated the principles for determining the constitutional rights of putative fathers, in cases where termination of their parental rights are implicated, from Stanley v. Illinois, supra, to Lehr v. Robertson, supra. Now the opposite situation pre-

sents itself. Petitioners are among hundreds of thousands of putative fathers each year who are secretly involved, without their knowledge, in a governmental welfare program seeking to unite putative fathers with out-of-wedlock children. The rights of putative fathers become implicated the moment applicants are required to assign their support rights to the state and to identify the putative fathers on government forms as responsible for paying support for the children, and the government targets them for filiation prosecution. 45 CFR §§ 232.11(a)(1), 232.12(a)(1)(2); ORS 418.042.

There is substantial need for this Court to grant this Writ and to establish the constitutional bounds for the exercise of the state's discretion with relationship to the constitutional rights of puta-

tive fathers to due process and equal protection.

A. PUTATIVE FATHERS POSSESS A LEGALLY PROTECTED FOURTEENTH AMENDMENT DUE PROCESS LIBERTY INTEREST AT THE TITLE IV-A AFDC APPLICATION FOR ASSISTANCE STAGE, WHICH PROVIDES THE BASIS FOR MAKING THE FEDERAL CLAIMS IN THE TITLE IV-D PROCEEDINGS.

The "opportunity interest" of putative fathers finds its genesis in the Title IV-A AFDC program goal of strengthening the welfare family, 42 U.S.C. § 601, and in three of this Court's cases: Stanley v. Illinois, supra; Caban v. Mohammed, 441 U.S. 380 (1979); and Lehr v. Robertson, supra. In Lehr, this Court, in finding that the significance of the blood relationship is more limited, presupposed an opportunity to grasp parental responsibility:

> "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If

> he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." Lehr v. Robertson, supra, 463 U.S. at 262.

This Court, in Lehr, recognized that the putative father's "opportunity interest" was entitled to constitutional protection, but concluded that New York's procedure adequately protected that interest. In accordance with the Lehr decision, other courts have recognized that unwed fathers possess "an opportunity interest to develop a relationship with their children which is constitutionally protected," which interest "begins at conception and endures probably throughout the minority of the child." In Re Baby Girl Eason, 257 Ga. 292, 358 S.E.2d 459, 462 (1987); Finnerty v. Boyett, 469 S.2d 287, 292 (La App 2d Cir 1985).

Contrasting with Lehr v. Robertson, supra, here, there exists a program of cooperative federalism within which the "opportunity interest" continues from the Title IV-A stage to state initiated Title IV-D filiation proceedings. The force of governmental action to establish a legal and financial relationship between the father and child presupposes that the state seeks the creation of a relationship between the father and the child, and, hence, the perpetuation of an already existing "opportunity interest." The "opportunity interest," fundamentally, represents the opportunity to have a timely determination of paternity made consistent with the child's best interests.

Even if the putative father is not, in fact, the biological father, he still has a protected "opportunity interest"

arising out of the fact that the mother-applicant, at the Title IV-A stage, states that she <u>believes</u> him to be the child's father. 45 CFR §§ 232.12(a)(1); ORS 418.042. That belief gives the putative father the opportunity to act as a responsible parent (and possibly become part of the family unit) even if he is not in fact the biological father of the child. The State of Oregon acknowledges that fact by allowing putative fathers to be legally recognized as "parent" without any scientific proof of biological paternity. See, e.g., ORS 109.092 (paternity through voluntary acknowledgment during pregnancy); ORS 109.070(5) (joint acknowledgment of paternity); ORS 109.070(1)(3) (marriage).

Clearly, the force of governmental action to unite putative fathers with out-of-wedlock children is sufficient, alone,

to give rise to the putative fathers' "opportunity interest." However, the "opportunity interest" arises for yet another reason. "Opportunity interests" of putative fathers to parent are protected constitutional interests because of the very nature of relationships within the family unit. In Lehr v. Robertson, supra, 463 U.S. at 258, this Court stated that "the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." Such a relationship within a family unit may be based upon the mother's belief that the putative father is the actual biological father; it is not dependent upon proof of biological paternity alone.

The attributes of a family relationship, which this Court has accorded con-

stitutional protection, Roberts v. United States Jaycee's, 468 U.S. 609, 619-620 (1984), are equally present when the person acting as father is not in fact the biological father:

> "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children * * * as well as from the fact of blood relationship." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972)) (emphasis added).

The Oregon Court of Appeals holding, that putative fathers have no constitutional right to notice, completely overlooks the reality of relationships within the family unit, including the shared interests of putative fathers and children. Although a putative father may not, in fact, be a child's biological father, upon being

given timely notice, he may become that child's legal parent.

Thus, the reasons for protecting the substantial and fundamental liberty interests, which are implicated at the Title-A application for assistance stage, form the basis for putative fathers' Title IV-D claims, which interrelate with the child's best interests. The interests are compelling and are present whether or not the putative father is in fact the biological father of the child.

B. PUTATIVE FATHERS POSSESS A LEGALLY PROTECTED FOURTEENTH AMENDMENT DUE PROCESS PROPERTY INTEREST AT THE TITLE IV-A STAGE, WHICH INTERRELATES WITH THE "OPPORTUNITY INTEREST."

That specific property right of the putative fathers which is implicated is " * * * the primary interest * * * in avoiding the serious economic consequences that flow from a court order that estab-

lishes paternity and its correlative obligation to provide support for the child." Rivera v. Minnich, 107 S.Ct. 3001, 3005, (1987).

The due process property interests (and rights to equal protection) are premised, in part, upon the putative father's duty or obligation to support the child. The putative father's property interests exist independently from a Title IV-D filiation and support order. As this Court has stated, "[t]he actions of judges neither create nor sever genetic bonds." Lehr v. Robertson, supra, 463 U.S. at 261. In Oregon the putative father's property interests arise at the child's birth and are further implicated at the Title IV-A stage, because the obligation to support the child arises at the child's birth, and not by virtue of a judge's decree. ORS

109.010; 109.060; Haxton and Haxton, 299 Or. 616, 705 P.2d 721 (1985); State ex rel AFSD v. McDonald, 42 Or. App. 793, 601 P.2d 875, 876 (1979).

Putative fathers have a constitutional due process property right to Title IV-A notice, because of their entitlement to rectify the needs of the children by coming forward and acknowledging paternity and raising the children, or to mitigate "the serious economic consequences" by beginning to pay some support for the children. See, e.g., Gresham v. Georgia Dept. of Human Resources, 257 Ga. 747, 363 S.E.2d 544 (1988); City of Clairmont v. Truell, 126 N.H. 30, 489 A.2d 581 (1985).

And the state's earliest action in seeking payment of child support by the putative father, through a Title IV-A notice, provides "the father a crucial

means of participating in the upbringing of the child" -- the ability to develop a relationship with his child -- which in turn forms the basis of the "opportunity interest." See Bowen v. Gilliard, 107 S.Ct. 3008, 3026 (1987), (J. Brennan and Marshall dissenting).

Thus, the reasons for protecting the substantial property interests of putative fathers at the Title IV-A stage are also compelling, because those interests inter-relate with their "opportunity interests." Protection of these interests can only strengthen the chances of developing a healthy relationship between parent and child.

C. THE STATE OF OREGON POLICY OF NOTIFYING MARRIED FATHERS OF TITLE IV-A AFDC APPLICATION FOR ASSISTANCE PROCEEDINGS, WHILE NOT SO NOTIFYING PUTATIVE FATHERS, VIOLATES THE RIGHTS OF PUTATIVE FATHERS TO EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AND PROVIDES BASIS FOR THEIR TITLE IV-D CLAIMS.

The practice of the State of Oregon, as noted by the Oregon Court of Appeals, where Title IV-A notice is sent to married fathers but not to unmarried fathers (App A-8, 9), constitutes a capricious abuse of discretion which advances no legitimate state purpose. Significantly, the state, in the trial court below, offered no compelling reason why notice should not be provided to all putative fathers. Such unequal treatment constitutes a policy which is not rationally related to achieving the purposes of the federal-state AFDC program, namely the ascertainment of all of the child's resources "from whatever source derived." 42 U.S.C. §§ 602(a)(7)(A); ORS 418.045(1)(a).

In addition, if a notice is not sent to putative fathers, they do not have access to the same information given to

married fathers, and, hence, will not be prompted by the state to make inquiry as to their responsibilities and "opportunity interests."

Because fundamental rights of putative fathers as well as biological fathers are implicated at the Title IV-A stage, the state is required to show a compelling state interest in the different treatment. Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966). However, even under the minimal scrutiny test which is applied to classifications created by welfare legislation, Califano v. Aznavorian, 439 U.S. 170 (1978), or the intermediate scrutiny test, Clark v. Jeter, supra, 108 S.Ct. at 1914, there is no rational basis for upholding the State of Oregon's notice policy.

D. FAILURE OF THE STATE TO PROVIDE TITLE IV-A NOTICE TO PUTATIVE FATHERS DEPRIVES THEM OF THEIR FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS RIGHTS AND PROVIDES BASIS FOR THEIR TITLE IV-D CLAIMS.

Procedural due process insures that the property rights and "opportunity interests" of putative fathers can be protected at a meaningful time and in a meaningful manner. Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The granting of assistance to the welfare family through a federal-state program, involving determinations which can ultimately lead to the imposition of new parent-child bonds, demands procedural due process for the putative fathers whose rights are implicated. Little v. Streater, 452 U.S. 1, 13 (1981); Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972). In this Social Security program, putative fathers become targeted

for filiation prosecution at the Title IV-A stage and the adversary nature of the relationship commences at the Title IV-A stage when the Title IV-A agency makes a determination that Title IV-A enforcement action is in the child's best interest and will occur. 42 U.S.C. §§ 602(a)(26)(B); 654(4)(A); 45 CFR §§ 232.11(a)(1); 232.12(a)(1); 232.42; 232.45(c); 302.31(a)(1)(2); 303.5(a); ORS 418.042. Immediately, then, putative fathers have a "right to know" that (1) they have been named as parties responsible for providing support, on state AFDC forms, (2) that they are targeted for filiation prosecution at some time in the future, and (3) that, upon being targeted for filiation prosecution, they have need to consult with legal counsel to become informed of their rights under state law.

The omission of AFSD to provide notice to fathers at the Title IV-A stage, together with the lack of an alternative mechanism to preserve their right to receive notice, is procedurally inadequate under the tests developed by this Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976); See also, Lehr v. Robertson, supra, 463 U.S. 263-264.

With respect to the timing of notice, the governing rule is that notice "must be granted at a time when the deprivation can still be prevented." Fuentes v. Shevin, supra, 407 U.S. at 81. Here, when the protected liberty interest is properly identified as the "opportunity interest" in forming a parent-child relationship consistent with the welfare child's best interests, it becomes clear that deprivation of that interest can only be pre-

vented by requiring the state to provide notice when state action first occurs, i.e., at the point when the mother's rights to child support must be assigned to the state by operation of law upon payment of AFDC benefits and she must identify the putative father. 45 CFR §§ 232.11(a)(1); 232.12(a)(1); ORS 418.Ø42.

The importance of protecting the "opportunity interest" is significant, as discussed. The risk of erroneous deprivation of that interest under the current procedure is enormous. In the Moore case, ten years elapsed between the time of assignment and the institution of the filiation proceeding. Imagine the shock of a putative father who first learns upon being served with a summons in a filiation proceeding that he may have fathered a child ten years ago. The opportunity to

attempt to develop a parent-child relationship in that instance is virtually gone, for no good reason.

Where the protected property interest is properly identified as the opportunity to rectify the needs of the child or mitigate the child support arrearage, it again becomes clear that deprivation of that interest can only be prevented by requiring the State of Oregon to provide notice at the Title IV-A stage.

The importance of protecting the putative father's property interest is also significant. Notice calculated to give putative fathers the opportunity to mitigate their child support obligations means that these fathers can financially plan for and support their welfare children. It also means that the fathers' income and resources can, as Congress

intended, be counted as resources for the children, 42 U.S.C. §§ 602(a)(7)(A); ORS 418.045(1)(a), leading to expeditious CSE welfare recapture. S.Report 98-387, 98th Cong., 2nd Sess. 2397, 2425 (1984).

Finally, timely notice from the state will also be calculated to give putative fathers the opportunity to verify their biological paternity in a timely fashion. Putative fathers will also not lose the ability to adequately prepare a defense for the filiation proceeding. Loss of material witnesses to the circumstances of conception, due to the passage of time, jeopardizes the ability to obtain a truly "accurate and just determination of paternity." See, Little v. Streater, supra, 452 U.S. at 14.

The state's interest in not providing notice immediately is minimal. The added

costs and administrative burden of providing notice, immediately, to all putative fathers would be relatively small, especially in light of the state's potential for earlier recapture of support debts with Title IV-A notice and the state's admission that notice is provided to absent fathers who are married to the mothers when the children were born.

The State of Oregon has provided no substitute procedural safeguards to protect the constitutional interests of fathers which are implicated at the Title IV-A stage. These putative fathers are not contending that due process requires the state to hold a full-blown hearing before AFDC benefits are paid. Notice in and of itself will protect the "opportunity interests" at stake here. Upon receiving notice, the burden will shift to

putative fathers to take action to protect their parental rights. Putative fathers can formally protect those rights in the State of Oregon by initiating filiation proceedings (ORS 109.125(1)(e)), marrying the mother (ORS 109.070(3)), or by filing a joint declaration of paternity (ORS 109.070(5)). They may also take informal steps to develop a relationship with the child. However, putative fathers can only take these steps if they are notified that they have fathered a child. When the state first becomes involved with the welfare family and can easily protect the "opportunity interest" and property interests at stake merely by providing notice, procedural due process requires that the state provide such notice.

Most importantly, the procedural due process rights at stake here are of na-

tional importance because of the interstate nature of the AFDC program. Even if a state, such as Georgia, (see, e.g., Gresham v. Georgia Dept. of Human Resources, supra), were to provide for such additional or substitute procedural notice safeguards, the risk of an erroneous deprivation of the property and liberty interests of putative fathers would still exist. The exigencies of our modern, mobile society mean that many individuals who receive AFDC assistance travel from state to state. A piecemeal, state-by-state notice remedy will not assure that putative fathers, living in states other than where Title IV-A AFDC assistance is granted, would receive notice. In order for the notice requirement to be dependable and to meet the requirements of procedural due process under the Fourteenth

Amendment, the decision to require notice must be uniform and national in scope.

E. THE OREGON COURT OF APPEALS DECISION, AS APPLIED TO FORECLOSE PUTATIVE FATHERS FROM RAISING CONSTITUTIONAL AND FACTUAL DEFENSES TO TITLE IV-D PATERNITY ACTIONS, DENIES THEM DUE PROCESS OF LAW.

This Court has stressed that "'[d]ue process requires that there be an opportunity to present every available defense.'" Lindsey v. Normet, 405 U.S. 56, 66 (1972).

These putative fathers possess substantive liberty and property interests and rights to equal protection, all of which rights and interests interrelate with the child's best interests. Because of the Oregon Court of Appeals' decision, loss of these constitutional rights may not be asserted by putative fathers as available, meritorious defenses when the courts determine the factual issue of

paternity in simplified, state-initiated Title IV-D filiation proceedings.

Allowing the putative father to assert meritorious constitutional defenses to state-initiated paternity proceedings "will not automatically compel a state to listen to (the putative father's) opinion of where the child's best interests lie," Lehr v. Robertson, supra, 463 U.S. at 262, nor will it preclude the trial court from determining that the putative father is obligated to pay support. It will allow the trial court to adjudicate paternity and to establish support obligations consistent with the child's best interests. The putative father's denial of paternity and assertion of defenses are not solely a "disavowal of any interest" in parenting, as alluded to in Rivera v. Minnich, supra, 107 S.Ct. at 3004. They are, in addition,

an assertion that his ability to parent has been damaged due to the lack of Title IV-A notice and subsequent loss of the "opportunity interest," and other circumstances, making establishment of paternity inconsistent with the child's best interests.

The Oregon Court of Appeals' decision fails to meet the procedural due process tests outlined by this Court in Mathews v. Eldridge, supra, 424 U.S. at 335. The court failed to consider the substantial private interests which are implicated, and which this Court has previously noted:

> "The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. * * *

> Just as the termination of such bonds demands procedural fairness, * * * so too does their imposition. Through the judicial process, the State properly endeavors to identify the father of a child born out of wedlock and to make him responsible for the child's maintenance. Obviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination." Little v. Streater, supra, 452 U.S. at 13 (citations omitted).

Likewise, the child and the putative father in a paternity action both have a compelling interest in insuring that the paternity determination, itself, is in the child's best interest. This is so because the substantive due process "opportunity interest" is a shared interest between the putative father and the child and is a liberty interest which entitles the putative father and child to receive a timely and meaningful determination of whether or not a relationship between the putative

father and child is, indeed, in the best interests of the welfare child.

Next, the Oregon Court of Appeals failed to consider the enormous risk of an erroneous deprivation of the shared opportunity interests through existing simplified state-initiated filiation procedures. Under the Oregon statutory scheme, if the state initiates a paternity proceeding, ORS 109.125(1)(b), the issue of paternity is determined first. ORS 109.155(1). If paternity is adjudicated, then the court establishes support as a second phase to the proceeding. 109.155(4). The child, through its guardian, or its mother, are not made parties to the proceeding. A determination of custody and visitation rights may be made in a separate proceeding after paternity is established. ORS 109.175. AFSD is not required to give

notice to putative fathers prior to initiating filiation proceedings. ORS 418.042. Finally, the court may order the unwed father to pay pre-notice accrued support and birth costs that the Title IV-A agency has paid on behalf of the child. ORS 109.155(4).

Given the usual absence of the mother or child as parties in the simplified proceedings, and the state's admitted lack of standing to decide issues of custody and visitation, plus the state's refusal to divulge the whereabouts of the mother and child due to confidentiality considerations (ORS 418.130), the risk is enormous that the child's best interests will not be evaluated in a simplified adjudication of paternity proceeding. See, e.g., State ex rel AFSD v. Tuttle, supra, 744 P.2d at 991-992.

Typically, the mothers, as well as the putative fathers, are poor and unrepresented by legal counsel. In the absence of any additional or substitute procedural safeguards, such as compulsory joinder of the mothers or children through their guardians, as parties, to assure that the childrens' best interests are considered in these simplified state-initiated filiation proceedings, the risk of harming the child psychologically becomes even greater. Thus, the reasons are compelling for allowing putative fathers to invoke the trial court's consideration of where the child's best interests lie. Such a procedural safeguard will help to insure not only the justness of paternity decisions in Oregon, in terms of the child's well being, but will also insure that putative fathers are accorded a mean-

ingful filiation hearing. Little v. Streater, supra, 425 U.S. at 14.

Finally, the Oregon Court of Appeals failed to weigh the state's interests against any burdens that the substitute procedural requirement would entail. With regard to the state's interest, this Court has stated:

> "The State admittedly has a legitimate interest in the welfare of a child born out of wedlock who is receiving public assistance, as well as in securing support of the child from those legally responsible. In addition, it shares the interests of the child and the defendant in an accurate and just determination of paternity. *** Nevertheless, the State also has financial concerns; it wishes to have the paternity actions in which it is involved proceed as economically as possible. . . ." Little v. Streater, supra, 452 U.S. at 14. (citations omitted) (Emphasis added)

Here, the State of Oregon provides simplified, economic filiation hearings, but at the expense of denying to the putative fathers a meaningful "and just" oppor-

tunity to be heard. The added cost and administrative burden of providing putative fathers the opportunity to assert meritorious constitutional and factual defenses to Title IV-D paternity adjudications would be very small, especially in light of the predominate practice of state jurisdictions which allow equitable and factual defenses in private filiation proceedings, as noted.

This Court has stated that where the contestants are the state and the individual, the state's presence "would weigh in favor of imposing a disproportionate share of the risk of error upon it by requiring" extra procedural safeguards. Rivera v. Minnich, supra, 107 S.Ct. at 3005, n. 8. "Because the state has superior resources," 107 S.Ct. at 3005, and because these proceedings involve the creation of

the parent-child bond, the child's best interests take on a significance which overshadows the state's sole "interest in avoiding financial responsibility for children born out of wedlock." Rivera v. Minnich, supra, 107 S.Ct. at 3005, n. 8. Therefore, the state's monetary interest "'is hardly significant enough to overcome private interests as important as those here,'" Little v. Streater, supra, 452 U.S. at 16, namely, the assurance that circumstances relevant to the child's best interests will be considered by the trial court in adjudicating paternity.

An assessment of the Mathews v. Eldridge factors demonstrates that these putative fathers, under the Oregon Court of Appeals ruling, will not receive the meaningful process they are constitutionally due at the simplified Title IV-D

hearing. They have no opportunity to rebut the presumption that an adjudication of paternity is in the welfare child's best interests. They have no legal ability to assert the defense that they have suffered the loss of constitutional rights and interests, the loss of which is so severe as to make an adjudication of paternity inconsistent with the child's best interests. A putative father, deprived of Title IV-A notice and deprived of a meritorious Title IV-D defense, who faces the state as an adversary, absent the mother or welfare child as a party to the proceedings, "lacks 'a meaningful opportunity to be heard.'" Little v. Streater, supra, 452 U.S. at 16. This fundamental, federal right to due process will be lost unless it is vindicated by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Philip F. Schuster, II
Counsel of Record
Roger F. Dierking
Counsel for Petitioners

April 7, 1989

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

State of Oregon, Exrel ADULT & FAMILY SERVICES DIV) Respondent	ORDER DENYING REVIEW
v.	CA A42217
	SC S35765
KITCHENS, RONNIE OSCAR MOORE, JOHN FRANK DICKINSON, ROBERT W Petitioners	
ACLU FOUNDATION OF OREGON INC. Amicus curiae	

The Court has considered the petition for review and ORDERS that it be denied.

DATED: JANUARY 31, 1989.

/s/ Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

Copies to:

Sylwester, Timothy A.	Attorney for: Respondent
Schuster, Philip F.	Attorney for: Petitioner
Bushong, Stephen K.	Attorney for: Amicus curiae

IN THE COURT OF APPEALS OF THE STATE OF OREGON

State of Oregon, Exrel ADULT & FAMILY SERVICES DIV Petitioner Appellant	) ORDER DENYING RECONSIDERATION
v.	)
KITCHENS, RONNIE OSCAR MOORE, JOHN FRANK DICKINSON, ROBERT W Respondents Respondents	) CA A42217 SC S35765

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has, on DECEMBER 23, 1988, denied the petition. ORAP 10.10. The Supreme Court may now proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 11.03.

/s/ George M. Joseph
CHIEF JUDGE

Copies To:
Sylwester, Timothy A — Attorney for: Appellant
Schuster, Philip F II — Attorney for: Respondent

IN THE COURT APPEALS OF THE
STATE OF OREGON

STATE ex rel
ADULT AND FAMILY SERVICES DIVISION,
Appellant,
v.
KITCHENS,
Respondent.

STATE ex rel
ADULT AND FAMILY SERVICES DIVISION,
Appellant,
v.
MOORE,
Respondent.

STATE ex rel
ADULT AND FAMILY SERVICES DIVISION,
Appellant,
v.
DICKINSON,
Respondent.

(D8609-66495; D8501-60531; D8503-61914;
CA A42217 (Control); CA A42218)
(Cases Consolidated)

Appeal from Multnomah County Circuit Court.

Mercedes F. Deiz, Judge.

Argued and submitted October 28, 1987.

Timothy A. Sylwester, Assistant Attorney General, Salem, argued the cause for appellant. With him on the briefs were David Frohnmayer, Attorney General, and

Virginia L. Linder, Solicitor General, Salem.

Philip F. Schuster, II, Portland, argued the cause for respondent. With him on the brief was Roger F. Dierking, Portland.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

NEWMAN, J.

Reversed and remanded.

NEWMAN, J.

In each of three filiation actions, ORS 109.124 et seq, to establish paternity, obtain future child support and recover unpaid past support, Adult and Family Services Division (AFSD) appeals a summary judgment for respondent, the alleged father. The judgment dismissed the petition and barred AFSD from bringing the action.[1] In each case, AFSD assigns

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[1] The judgment apparently incorporates the order's provision that bars AFSD from bringing the action.

as error that the court granted respondent's motion for summary judgment. We reverse.

In each action, the affidavits that the parties submitted on the motions for summary judgment are substantially similar. Each mother gave birth to a child out of wedlock. Each applied for and received aid to dependent children (ADC) and assigned all of her support rights to the state. ORS 418.042(1).[2] On her application for assistance, each named one of the respondents as the father.

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[2] ORS 418.042(1) provides:

> "If [ADC] is paid and received for the support of a child, the rights to child support that any person may have for the child are deemed to have been assigned by operation of law to the Department of Human Resources. Notice of the assignment by operation of law shall be given to the applicant at the time of application for public assistance and shall be given to any obligee who may hold some interest in such support rights."

Although in his answer each putative father denied paternity, he neither denied nor admitted paternity in his affidavit or in any other document filed in the trial court or in this court or in any statement of his attorneys. Each affidavit, however, raises the issue of whether another man might be the father, because the affiant either asserted or implied that the mother was having sexual relations with other men at the time when the affiant had sexual relations with her.[3]

-----[3]

Moore's affidavit states:

"About one month after the party Barbara called me and told me she missed her period. I told her that I was not sure I had intercourse with her and she should check with the other persons she dated."

Dickinson's affidavit states:

"At the time I knew this woman, she stated to me that she was still seeing her ex-husband, that she was dating her dentist and was seeing another fellow."

Each mother asserted that the respondent was the father and that she had told him of his paternity shortly after she became aware that she was pregnant. Two respondents do not admit or deny that the mother told them that they were the fathers; one does deny it. Following the child's birth, each respondent had little, if any, contact with the child or its mother and did not provide any substantial support to the child.

In each case, AFSD did not promptly notify any respondent that the mother had named him as the father on her application for assistance or of her assignment

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[3] cont. -

Kitchen's affidavit states:
"After I became acquainted with the mother of the child born out of wedlock in November or December of 1981, I had sexual relations with her. The mother was living with her relatives at the time, in my opinion, she was having sexual relations with other men."

or of AFSD's payment of support for the child. Respondents learned of these events only when AFSD filed the filiation petitions, two and a half years, four years and ten years, respectively, after the mother's assignment. AFSD claimed that substantial back support payments had accrued against each respondent when AFSD filed the actions.

To obtain information relevant to a mother's eligibility for ADC benefits, AFSD sends its "Form 412 letter" to a father of a child born in wedlock. The letter states that "the case record indicates that you may have an interest in [the child]" and asks whether the recipient contributes any support or provides medical coverage for the child. Ordinarily, AFSB does not send the form letter to an alleged father of a child born out

of wedlock. It did not send a "Form 412 letter" to any of the respondents.

In each case, the trial court's order granting the motion for summary judgment recited that

> "there is no genuine issue as to any material fact as to the following matters, and accordingly the court finds as follows:
>
> "1. The mother designated respondent as the father when she applied for assistance or shortly thereafter;
>
> "2. The state did not notify the respondent when the mother applied for assistance or when the mother named respondent as designated father;
>
> "3. A substantial period of time elapsed with no association between the respondent and the child born out of wedlock;
>
> "4. The state notifies married fathers that the mother has applied for public assistance and does not so notify unmarried fathers."

It did not specifically hold that there was no genuine issue of material fact respecting paternity, but recited:

"[T]he lack of notice has deprived respondent of his guarantees to due process and equal protection under the 14th Amendment of the United States Constitution and under the Oregon Constitution; and

"The court having entered the above findings and conclusion of law and having further found that there is no genuine issue as to any material fact and that the respondent is entitled to judgment as a matter of law."

The order then granted the motion for summary judgment, recited that it "barred [AFSD] from bringing the * * * paternity action" and dismissed the action. Thereafter the court granted judgment for each respondent.

Each respondent asserts that AFSD denied him due process and equal protection under the Fourteenth Amendment and equal privileges and immunities under Article I, section 20, of the Oregon Constitution, and that estoppel bars AFSD's claims, because it failed to notify him

when the mother assigned her support rights and named him as father. He also asserts that his only effective remedy is just what the court did: dismiss the action and bar AFSD from bringing it.

Summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ORCP 47C; Christensen v. Murphy, 296 Or 610, 613, 678 P2d 1210 (1984). Here, there is a genuine issue of fact in each case respecting paternity. The affidavits do not establish that there is no genuine issue of fact respecting paternity. Moreover, the issue of paternity is material in each case. For example, if a respondent is not in fact a father, AFSD's failure to inform him to the contrary could not have deprived him of liberty or pro-

perty under the Due Process Clause of equal protection or of any privilege or immunity under Article I, section 20, of the Oregon Constitution.

Respondents, however, argue in effect that, even if paternity is a genuine issue of fact, it is not material. They assert that, if AFSD is not barred by estoppel from bringing the action, it will continue not to notify other designated fathers of children born out of wedlock of their paternity. To invoke estoppel, however, respondents must show detrimental reliance. See, Miltenberger v. Howard's Plumbing, 93 Or App 475, ___ P2d ___ (1988); Employment Div v. Western Graphics Corp., 76 Or App 608, 612, 710 P2d 788 (1985). Unless a respondent is a father, he could not have acted to his detriment in reliance on AFSD's failure to notify

him of that status. AFSD's failure to inform him that he is the claimed father could not harm him. On this record, respondents may not invoke claims of other persons who might be fathers. See Kelly v. Silver, 25 Or App 441, 452, 549 P2d 1134 (1976). Paternity is, therefore, material; and the court should not bar AFSD from seeking to determine at trial the factual question -- paternity -- which brings into play respondents' claims.

We must address one other issue. AFSD asserted below in opposition to the summary judgment motions that there were disputed issues of fact, but it did not identify them. Its brief here, however, states that

> "[t]he trial court's ruling left unresolved several disputed fact questions squarely presented in each case, such as to [sic] whether respondent was in fact the father of the child, whether he had actual notice of that fact,

> whether he had a support obligation with respect to the child that he failed to pay, and whether he should pay child support in the future."

Nonetheless, it assigns as error only that:

> "1. The trial court erred in granting respondents' motions for summary judgment.
>
> "2. The trial court erred in granting respondents' motions to dismiss the filiation proceedings."

It does not specifically assert that the court erred because there are genuine issues of material fact.

In this summary judgment proceeding, all of the parties ask us to reach the merits of their constitutional and estoppel arguments. On this record, we cannot. Even though AFSD may not have properly preserved the matter as error, it is apparent on the face of the record that paternity is a genuine issue of material

fact. See ORAP 7.19(5).[4] The court erred when it granted respondents' motions for summary judgment.

Because each judgment is reversed, respondents are not entitled to the judgments for attorney fees. Accordingly, it is not necessary to discuss further AFSD's third assignment of error.[5]

Reversed and remanded.

---

[4]AFSD's assignments of error are arguably broad enough to encompass the error.

[5]AFSD's third assignment of error is that the trial court erred in awarding respondents their attorney fees incurred in a collateral federal court action.

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
Department of Domestic Relations

STATE OF OREGON, ex rel ADULT AND FAMILY SERVICES) DIVISION, Petitioner, and RONNIE OSCAR KITCHENS, Respondent.	NO. D8609-66495 JUDGMENT

Based upon the court's Order dated _____ dismissing the petition in this case, judgment is entered in favor of respondent Ronnie Oscar Kitchens and against the State and respondent is awarded judgment against the State as and for his reasonable attorney fees in the sum of $1,500.00 and for his costs and disbursements in the sum of $60.00.

Dated this 27 day of October, 1986.

/S/ Mercedes F. Deiz
Mercedes F. Deiz, Circuit Court Judge

Submitted by:

Philip F. Schuster, II OSB 72231
Of Attorneys for respondent

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
Department of Domestic Relations

STATE OF OREGON, ex rel, ADULT AND FAMILY SERVICES DIVISION, Petitioner, and RONNIE OSCAR KITCHENS, Respondent.	NO. D8609-66495 ORDER GRANTING SUMMARY JUDGMENT AND OF DISMISSAL

On October 20, 1986 this court heard oral argument on respondent's motion for summary judgment. Petitioner appeared by and through Shelley K. McIntyre and Lawrence R. Young, Assistant Attorneys General, and respondent appeared by and through his attorneys Philip F. Schuster, II and Roger F. Dierking.

The court having heard argument of respective counsel, and the court having found that the pleadings, admissions and affidavits on file herein show that there is no genuine issue as to any material

fact as to the following matters, and accordingly the court finds as follows:

1. The mother designated respondent as the father when she applied for assistance or shortly thereafter;

2. The state did not notify the respondent when the mother applied for assistance or when the mother named respondent as designated father;

3. A substantial period of time elapsed with no association between the respondent and the child born out of wedlock;

4. The state notifies married fathers that the mother has applied for public assistance and does not so notify unmarried fathers.

The court enters the following conclusion of law:

1. That the lack of notice has deprived respondent of his guarantees to due process and equal protection under the 14th Amendment of the United States Constitution and under the Oregon Constitution; and

The court having entered the above findings and conclusion of law and having further found that there is no genuine issue as to any material fact and that the respondent is entitled to judgment as a matter of law and being fully advised in the premises, now therefore it is hereby

ORDERED that respondent's motion for summary judgment be and the same hereby is granted and it is

FURTHER ORDERED that petitioner is barred from bringing the within paternity action and this action shall be and hereby is dismissed.

Dated this 27 day of October, 1986.

/s/ Mercedes F. Deiz
Mercedes F. Deiz
Circuit Court Judge

Submitted By:

/s/ Phil Schuster
Philip F. Schuster, II OSB 72231
Of Attorneys for respondent

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
Department of Domestic Relations

STATE OF OREGON, ex rel, ADULT AND FAMILY SERVICES DIVISION, Petitioner, and JOHN FRANK MOORE, Respondent.	NO. D85Ø1-6Ø531 CONSOLIDATED
STATE OF OREGON, ex rel ADULT AND FAMILY SERVICES DIVISION, Petitioner, and ROBERT W. DICKINSON, Respondent.	NO. D85Ø3-61914 JUDGMENT

Based upon the court's Order dated September 22, 1986 dismissing the petitions in these cases, judgment is entered in favor of respondents Moore and Dickinson and against the State and respondents are awarded judgment against the State as and for their reasonable attorney fees in the sum of $12,211.6Ø and

for their costs and disbursements in the sum of $144.

Dated this 27 day of October, 1986.

/S/ Mercedes F. Deiz
Mercedes F. Deiz, Circuit Court Judge

Submitted By:

Philip F. Schuster, II OSB 72231
Of Attorneys for respondents

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
Department of Domestic Relations

STATE OF OREGON, ex rel, ADULT AND FAMILY SERVICES) DIVISION, Petitioner, and JOHN FRANK MOORE, Respondent.	NO. D85Ø1-6Ø531 CONSOLIDATED
STATE OF OREGON, ex rel ADULT AND FAMILY SERVICES) DIVISION, Petitioner, and ROBERT W. DICKINSON, Respondent.	NO. D85Ø3-61914 ORDER GRANTING SUMMARY JUDGMENT AND OF DISMISSAL

On September 1Ø, 1986 this court heard oral argument on respondent's motion for summary judgment. Petitioner appearing by and through Shelley K. McIntyre, Assistant Attorney General, and respondents appearing by and through their attorney Philip F. Schuster, II. Also

present was Roger F. Dierking, of attorneys for respondent.

The court having heard argument of respective counsel, and the court having found that the pleadings, admissions and affidavits on file herein show that there is no genuine issue as to any material fact as to the following matters, and accordingly the court finds as follows:

1. The mothers designated respondents as the fathers when they applied for assistance or shortly thereafter;

2. The state did not notify the respondents when the mothers applied for assistance or when the mothers named respondents as designated fathers;

3. A substantial period of time elapsed with no association between the

respondents and the children born out of wedlock;

4. The state notifies married fathers that the mother has applied for public assistance and does not so notify unmarried fathers.

The court enters the following conclusion of law:

1. That the lack of notice has deprived respondents of their guarantees to due process and equal protection under the 14th Amendment of the United States Constitution and under the Oregon Constitution; and

The court having entered the above findings and conclusion of law and having further found that there is no genuine issue as to any material fact and that the respondents are entitled to judgment as a

matter of law and being fully advised in the premises, now therefore it is hereby

ORDERED that respondents' motion for summary judgment be and the same hereby is granted and it is

FURTHER ORDERED that petitioner is barred from bringing the within paternity actions and these actions shall be and hereby are dismissed.

Dated this 22 day of September, 1986.

/s/ Mercedes F. Deiz
Mercedes F. Deiz
Circuit Court Judge

Submitted By:

/s/ Phil Schuster
Philip F. Schuster, II OSB 72231
Of Attorneys for respondents

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
Department of Domestic Relations

STATE OF OREGON, ex rel ADULT AND FAMILY SERVICES DIVISION, Petitioner, and JOHN FRANK MOORE, Respondent.	NO. D85Ø1-6Ø531 CONSOLIDATED
STATE OF OREGON, ex rel ADULT AND FAMILY SERVICES DIVISION, Petitioner, and ROBERT W. DICKINSON, Respondent.	NO. D85Ø3-61914 SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT

STATE OF OREGON)
) ss.
County of Multnomah)

I, ARTHUR C. EMLEN, being first duly sworn on oath, depose and say as follows:

That I am a Professor of Social Work at Portland State University and head of the Regional Research Institute for Human Services at Portland State University. I

received my bachelor of arts degree in philosophy from UCLA in 1953 and my masters degree of social welfare in 1958 from UCLA. I received my doctorate degree from Tulane University in 1965. My doctorate dissertation involved social work research.

I was a post-doctoral fellow at the University of California at Berkeley. I joined the faculty of Portland State University in the fall of 1965 as a Child Welfare Specialist. I have conducted studies of child care for 23 years and I have been principle investigator of a series of research projects concerning the need for family permanency for children who enter the child welfare programs.

A copy of my resume is attached to this affidavit and incorporated herein by this reference.

I am familiar with the case filed in the United States District Court for the District of Oregon entitled Kitchens, et al vs. Bowen, et al, Case Number 85-1815JU. Many of the issues in this case concerning the lack of notice to designated parents are the same issues which I have been involved with in my research concerning children involved in foster care planning and child welfare programs.

In all child welfare matters the key to development of children is clarity with regard to whom they belong. It is illogical to assume that a relationship exists when, in fact, it does not and there has been no opportunity given for such a relationship to develop. Based upon my training and experience, it is my opinion that the passage of time where no contact

occurs between a natural parent and his child will make it less likely that the natural parent will develop a meaningful parent-child relationship with that child. Therefore, if a natural parent is forced to have an association with a child after the passage of a considerable period of time, without prior contact, in my opinion, this can force the natural father and child to experience conflict and confusion regarding what that relationship represents. In my opinion, there is less basis for a parent-child relationship after the passage of time than there is if the father is encouraged to take a parenting role at or near the time of the child's birth in a timely manner.

In my opinion, for the state to fail to settle the issue of a parent-child relationship at the first instance, when

assistance is provided, is detrimental to the child and promotes instability in family relationships.

In my opinion, if the state fails to join the issue of the father's ability and desire to parent the child and to settle this issue with legal clarity at the first instance, when assistance is provided by the state, then the passage of time before this issue is settled will mean that the natural father is less likely to want to parent the child. If the natural father is desirous of parenting the child in the first instance, the passage of time will mean the loss, to the father, of the ability to develop a parenting bond and relationship with the child, assuming that it is desirable that the natural father nurture such a parent-child relationship.

In my opinion, if the state has determined that it is in the child's best interest to bring a paternity action and to obtain support for the child, then it is imperative that these rights and relationships, including the right of the father to obtain custody of the child or visitation rights with that child, be handled as expeditiously as possible from the time that assistance is first given to the mother.

If it is in the child's best interest to establish the child's paternity then it is far better that this paternity be established as quickly as possible, in the first instance, rather than to wait many years before bringing a paternity action to establish these rights and relationships.

Assuming that a natural father has an ability to parent a child, then the loss of that ability to parent, namely the ability to form a bond and a relationship with the child and to have association with that child, is a loss which is devastating to both the natural father and the child. The right to grasp the opportunities of parenthood, assuming that the natural father has an ability to parent, is a fundamental right and an important right in the context of family relationships.

I make this affidavit in good faith and in support of the within motion for summary judgment.

/s/ Arthur C. Emlen
Dr. Arthur C. Emlen

Subscribed and Sworn before me this

5th day of September, 1986.

/s/ Philip F. Schuster II
Notary Public for Oregon
My Commission Expires: 4-9-87

(Dr. Emlen's resume not reproduced)

APPENDIX D

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS IN PERTINENT PART

42 USC § 601. Authorization of appropriations

> "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal

independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 USC § 602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

"(a) Contents

"A State plan for aid and services to needy families with children must --

(7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency --

(A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid;

* * * * *

"(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required --

"* * * * *

"(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; * * *"

42 USC § 654. State plan for child and spousal support

"A state plan for child and spousal support must --

* * * * *

(4) provide that such State will undertake --

"(A) in the case of a child born out of wedlock with respect to whom an assignment under section 602(a)(26) of this title is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so, and

* * * * *"

42 USC § 666. Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement

"(a) Types of procedures required

"In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

* * * * *

"(5) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

* * * * *"

REGULATORY PROVISIONS IN PERTINENT PART

45 CFR § 232.11. Assignment of rights to support.

"(a) The State plan must provide that:

(1) As a condition of eligibility for assistance, each applicant for or recipient of AFDC shall assign to the State any rights to support from any other person as such applicant or recipient may have: * * *"

45 CFR § 232.12. Cooperation in obtaining support.

"The State plan must meet all requirements of this section.

"(a) The plan shall provide that as a condition of eligibility for assistance, each applicant for or recipient of AFDC will be required to cooperate (unless good cause for refusing to do so is determined to exist in accordance with §§ 232.40 through 232.49 of this chapter) with the State in:

"(1) Identifying and locating the parent of a child for whom aid is claimed;

"(2) Establishing the paternity of a child born out of wedlock for whom aid is claimed;

* * * * *"

CFR § 232.42 Good cause circumstances.

"(a) Circumstances under which co-operation may be 'against the best interests of the child.' The plan shall provide that the State or local agency will determine that cooperation in establishing paternity and securing support is against the best interests of the child only if:

"(1) The applicant's or recipient's cooperation in establishing paternity or securing support is reasonably anticipated to result in:

"(i) Physical harm to the child for whom support is to be sought;

"(ii) Emotional harm to the child for whom support is to be sought;

"(iii) Physical harm to the parent or caretaker relative with whom the child is living which reduces such person's capacity to care for the child adequately;

"(iv) Emotional harm to the parent or caretaker relative with whom the child is living, of such nature or degree that it reduces such person's capacity to care for the child adequately; or

"(2) At least one of the following circumstances exists, and the State or local agency believes that because of the existence of that circumstance, in the particular case, proceeding to establish paternity or secure support would be detrimental to the child for whom support would be sought.

"(i) The child for whom support is sought was conceived as a result of incest or forcible rape;

"(ii) Legal proceedings for the adoption of the child are pending before a court of competent jurisdiction; or

"(iii) The applicant or recipient is currently being assisted by a public or licensed private social agency to resolve the issue of whether to keep the child or relinquish him for adoption, and the discussions have not gone on for more than 3 months.

"(b) Physical harm and emotional harm defined. Physical harm and emotional harm must be of a serious nature in order to justify a finding of good cause under paragraph (a)(1) of this section. A finding of good cause for emotional harm may only be based upon a demonstration of an emotional impairment that substantially affects the individual's functioning.

"(c) Special considerations related to emotional harm. The plan shall provide that, for every good cause determination which is based in whole or

part upon the anticipation of emotional harm to the child, the parent or the caretaker relative, as provided for in paragraphs (a)(1) (ii) and (iv) of this section, the State or local agency will consider the following:

"(1) The present emotional state of the individual subject to emotional harm;

"(2) The emotional health history of the individual subject to emotional harm;

"(3) Intensity and probable duration of the emotional impairment;

"(4) The degree of cooperation to be required; and

"(5) The extent of involvement of the child in the paternity establishment or support enforcement activity to be undertaken."

45 CFR § 232.45. Notice to the IV-D Agency

"The plan shall provide that:

"*****

"(c) The State and local agency will promptly report to the IV-D agency all cases in which it has determined that there is not good cause for refusal to cooperate."

45 CFR § 302.31. Establishing paternity and securing support.

"The State plan shall provide that:

"(a) The IV-D agency will undertake:

"(1) In the case of a child born out of wedlock with respect to whom an assignment under § 232.11 of this title or section 471(a)(17) of the Act is effective, to establish the paternity of such child; and

"(2) In the case of any individual with respect to whom an assignment under § 232.11 of this title or section 471(a)(17) of the Act is effective to secure support for a child or children from any person who is legally liable for such support, using State laws and reciprocal arrangements adopted with other States when appropriate. Effective October 1, 1985, this includes securing support for a spouse or former spouse who is living with the child or children, but only if a support obligation has been established for that spouse and the child support obligation is being enforced under the title IV-D State plan."

42 CFR § 303.5. Establishment of paternity.

"(a) For all cases referred to the IV-D agency or applying under § 302.33 of this chapter in which paternity has

not yet been established, the IV-D agency must:

"(1) Attempt to establish paternity by court order or other legal process established under State law; or

"(2) Establish paternity by acknowledgment if under the State law such acknowledgment has the same legal effect as court-ordered paternity, including the right to benefits other than child support.

"(b) The IV-D agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity."

42 CFR §§ 305.24. Establishing paternity.

"For the purposes of this part, in order to be found to be in compliance with the State plan requirement that the State undertake the establishment of paternity (45 CFR 302.31(a) and 302.33), a State must:

* * * * *

"(b) Have established and use written procedures for establishing the paternity of any child at least until the child's 18th birthday: * * * * *"

STATUTORY PROVISIONS IN PERTINENT PART

ORS 109.010 Duty of support.

"Parents are bound to maintain their children who are poor and unable to work to maintain themselves; and children are bound to maintain their parents in like circumstances."

ORS 109.060 Legal status and legal relationships where parents not married.

"The legal status and legal relationships and the rights and obligations between a person and the descendants of the person, and between a person and parents of the person, their descendants and kindred, are the same for all persons, whether or not the parents have been married."

ORS 109.070 Establishing paternity.

"The paternity of a person may be established as follows:

"(1) The child of a wife cohabiting with her husband who was not impotent or sterile at the time of the conception of the child, shall be conclusively presumed to be the child of her husband, whether or not the marriage of the husband and wife may be void.

"*****

"(3) By the marriage of the parents of a child after birth of the child.

"*****

"(5) By joint declaration of paternity filed with the Vital Statistics Unit of the Health Division of the Department of Human Resources in the form approved by the state registrar and with the fee prescribed in ORS 432.145. The Vital Statistics Unit shall prepare a new birth certificate under the procedure established by ORS 432.420.

"*****"

ORS 109.092 Establishing paternity by acknowledgment; mother surrendering child for adoption.

"When it is determined that a woman is pregnant with a child, the woman and any man to whom she is not married and with whom she engaged in sexual intercourse at approximately the time of conception have an obligation to recognize that the man may be the other person responsible for the conception. During the months of pregnancy, the man may join the woman in acknowledging paternity and assuming the rights and duties of expectant parenthood. If the man acknowledges paternity of the expected child and the woman denies that he is the father or refuses to join him in acknowledging paternity, the man may seek relief under ORS 109.125. If the woman wants the man to join her in acknowledging his paternity of the expected child and the man denies that he is the

father or refuses to join her in acknowledging paternity, the woman may seek relief under ORS 109.125. If after the birth of the child the mother decides to surrender the child for adoption and paternity has not been acknowledged as provided in ORS 109.070(5) or the putative father has not asserted his rights in filiation proceedings, the mother has the right without the consent of the father to surrender the child as provided in ORS 418.270 or consent to the child's adoption."

ORS 109.125 Initiation of proceedings.

"(1) Any of the following may initiate proceedings under this section:

"*****

"(b) Any state agency, if furnishing support to the mother for the benefit of the child or if furnishing services or assistance of any kind because of the birth, or impending birth, of the child;

"*****

"(e) A person claiming to be the father of a child born out of wedlock or of an unborn child who may be born out of wedlock; or

"******"

ORS 109.155 Conduct of trial; postponement; orders.

"(1) The court or the jury, in a private hearing, shall first determine the issue of paternity. If the respondent admits the paternity, such admission shall be reduced to writing, verified by the respondent and filed with the court. If the paternity is denied, corroborating evidence, in addition to the testimony of the parent or expectant parent, shall be required.

"*****

"(4) The court shall have the power to order either parent to pay such sum as it deems appropriate for the past and future support and maintenance of the child during its minority and while the child is attending school and the reasonable and necessary expenses incurred or to be incurred in connection with prenatal care, expenses attendant with the birth and postnatal care. The court may grant the prevailing party reasonable costs of suit, and reasonable attorney fees at trial and on appeal."

ORS 109.175 Determination of legal custody after paternity established.

"If paternity of a child born out of wedlock is established pursuant to a petition filed under ORS 109.125 or an order or judgment entered pursuant to ORS 109.124 to 109.230 or ORS 416.400 to 416.470, the parent with physical custody at the time of filing of the

petition or the notice under ORS 416.415 has sole legal custody until a court specifically orders otherwise. The first time the court determines who should have legal custody, neither parent shall have the burden of proving a change of circumstances. The court shall give primary consideration to the best interests and welfare of the child and shall consider all the standards set out in ORS 107.137."

ORS 418.042 Assignment of support rights and cooperation with Department of Human Resources; protection of legal rights.

(1) Aid, as defined in ORS 418.035(2), shall not be granted to, or on behalf of, any applicant, or recipient and for as long as the applicant or recipient refuses to assign to the Department of Human Resources any rights to support from any other person such applicant may have personally or in behalf of any other family member for whom the applicant is applying for or receiving aid, and which have accrued at any time such assignment is executed, or refuses to cooperate with the Department of Human Resources in establishing the paternity of a child born out of wedlock and in obtaining support or other payments or property due the applicant or the child. If aid is paid and received for the support of a child, the rights to child support that any person may have for the child are deemed to have been assigned by operation of law to the

Department of Human Resources. Notice of the assignment by operation of law shall be given to the applicant at the time of application for public assistance, and shall be given to any obligee who may hold some interest in such support rights by depositing a notice in the United States mail, postage prepaid, addressed to the last-known address of such person.

(2) However, nothing in this section shall be construed to require an applicant or recipient to provide identification information the validity of which is subject to honest doubts or the public disclosure of which might reasonably tend to subject the applicant to a deprivation of constitutional liberty or property rights."

ORS 418.Ø45 How amount of aid is determined.

"(1) The need for and amount of aid to be granted for any dependent child or relative pursuant to ORS 418.Ø35 to 418.172 shall be determined, in accordance with the rules and regulations of the Adult and Family Services Division, taking into account:

"(a) The income, resources and maintenance available to such child and relative from whatever source derived, any expenses reasonably attributable to the earning of any such income, the necessary expenditures of the child or relative and the conditions existing in each case."

ORS 418.130 Use and custody of records of aid to dependent children.

"No person shall, except for purposes directly connected with the administration of aid to dependent children and in accordance with the rules of the Adult and Family Services Division, or the Children's Services Division, whichever is applicable, solicit, disclose, receive, make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of, any list of or names of, or any information concerning, persons applying for or receiving such aid, directly or indirectly derived from the records, papers, files or communications of the Adult and Family Services Division or the Children's Services Division, whichever is applicable, or acquired in the course of the performance of official duties."

Supreme Court, U.S.
FILED
JUL 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1677

In the Supreme Court of the United States

OCTOBER TERM, 1988

RONNIE O. KITCHENS, et al.,

Petitioners,

v.

STATE OF OREGON ex rel. ADULT AND FAMILY SERVICES DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF FOR RESPONDENT IN OPPOSITION

DAVE FROHNMAYER
Attorney General of Oregon
JAMES E. MOUNTAIN, JR.
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
TIMOTHY A. SYLWESTER
RIVES KISTLER
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1. Does the state court's judgment rest on an independent and adequate state procedural ground?

2. Is the state court's judgment final within the meaning of 28 U.S.C. section 1257(3) (1982)?

3. Does the Due Process Clause require a state to notify a putative father when the mother applies for public assistance?

4. Does the Equal Protection Clause preclude a state from distinguishing those parents whose legal obligation to provide child support has been established from those parents whose obligation has not been established?

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent State of Oregon accepts, as adequate for review, petitioners' statement of the opinions below and their statement of the constitutional and statutory provisions involved.

JURISDICTION

Although petitioners filed a timely petition for certiorari, this Court lacks jurisdiction for two reasons. First, the state court's judgment rests on an adequate and independent state procedural ground. Second, the state court's judgment is not final within the meaning of 28 U.S.C. section 1257(3) (1982). Both of these issues are discussed below as reasons for denying the petition for certiorari.

STATEMENT OF THE CASE

This brief will first discuss the procedural posture in which this litigation arises. It then will discuss the applicable facts.

I. The Procedural Posture of this Case.

This litigation arises out of three suits that were consolidated in state court. The state initiated separate proceedings against Ronnie Kitchens, John Moore, and Robert Dickinson (the "putative fathers" or "petitioners") to establish that each was the father of an illegitimate child and responsible for that child's support. Each petitioner answered denying that he was the father. Each petitioner also raised affirmative defenses in which he alleged that the state failed to notify him that it was providing support to the child and that the mother had named him as the father of the child when she applied for public assistance. Each petitioner claimed that this failure violated the Oregon Constitution, the Due Process Clause, and the Equal Protection Clause. Finally, each petitioner alleged that, as a matter of state law, the state was estopped or barred by laches from establishing his paternity at this point.

The putative fathers moved for summary judgment on their state and federal constitutional affirmative defenses. The state opposed the motions on two grounds. Based on affidavits it filed, the state argued that summary judgment should be denied because there were disputed issues of material fact. It also argued that it should prevail as a matter of law. The trial court found that there were no disputed issues of material fact, and that the putative fathers were correct as a matter of state and federal constitutional law.

The Oregon Court of Appeals reversed. *State ex rel. AFSD v. Kitchens*, 93 Or. App. 685, 690, 763 P.2d 1196 (1988). It held, as a matter of state procedural law, that there were disputed issues of material fact that made summary judgment improper. It reasoned that there was no need to reach the putative fathers' constitutional defenses until the trial court resolved whether they were the biological fathers—a factual question that remained in dispute. *Id.*, 93 Or. App. at 690-91. If on remand the trial court found they were, then it would need to decide those defenses. *Id.* at 691.

The court of appeals' decision does not reach the putative fathers' state or federal constitutional claims. Nor does its opinion bar the trial court from considering those claims on remand. Its opinion merely establishes the sequence in which the trial court should consider the non-constitutional and constitutional issues presented in this litigation. The Oregon Supreme Court denied review,[1] 307 Or. 340, 760 P.2d 400 (1989) and the putative fathers have petitioned for certiorari.

II. Facts.

Because this litigation arises on the putative fathers' motions for summary judgment, the following facts are set out

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[1] Oregon Supreme Court review, like the Court's review by writ of certiorari, is discretionary.

in the light most favorable to the state. *See Seeborg v. General Motors Corporation*, 284 Or. 695, 699, 588 P.2d 1110 (1978) (under Oregon procedure, "[t]he record on summary judgment is viewed in the light most favorable to the party opposing the motion"). Although the facts in each of the three consolidated cases are parallel, it is appropriate to discuss briefly the facts concerning each putative father.

A. Ronnie Kitchens.

Ronnie Kitchens was having sexual relations with Rhonda Marsh. (Resp. to Summary Judgment, Ex. 2, Depo. of Ronnie Kitchens at 11-12). In December 1981, Ms. Marsh told Mr. Kitchens that she was pregnant with his child. (Resp. to Summary Judgment, Ex. 3, Aff. of Rhonda Marsh Kastel). Ms. Marsh asked Mr. Kitchens to marry her, but he refused and told her to have an abortion. (*Id.*). She refused to do so. (*Id.*). In April 1982, Mr. Kitchens ended his relationship with Ms. Marsh. (*Id.*). He told her to go on welfare if she needed money. (*Id.*).

Two weeks after the baby's birth in September 1982, Mr. Kitchens visited Ms. Marsh and the infant. (*Id.*). He has never shown any other interest in the child, nor has he paid any support for the child. (*Id.*). Ms. Marsh testified in her affidavit:

> I have stayed in the same place thinking he might change his mind and come back. He has always known where to find us. Even when the baby was sick and his family told him the baby nearly died, he never came to see us. He also has bragged to me that about how no one will ever make him pay [child support].

(*Id.*)

After Mr. Kitchens refused to visit the child or pay support, Ms. Marsh applied to the Oregon Adult and Family Services Division for Aid to Families with Dependent Children ("AFDC"). As part of her application, she named Mr.

Kitchens as the father of her child. Ms. Marsh also assigned her right to child support to the state. The state welfare agency did not notify Mr. Kitchens that Ms. Marsh named him as the father. The state initiated proceedings in 1986 to have Mr. Kitchens declared to be the father of the child and to recover past and future child support from him pursuant to the assignment.

B. John Moore.

Mr. Moore had a "casual" relationship with Barbara Simington. (Motion for Summary Judgment, Ex. D, Aff. of John Moore). When Ms. Simington found out that she was pregnant, she told Mr. Moore that he was the father. (Resp. to Summary Judgment, Ex. 3, Aff. of Barbara Simington). Mr. Moore said that he did not want another child and told her to get an abortion. (*Id.*). Ms. Simington refused. (*Id.*).

Mr. Moore came to the hospital after the child was born on July 31, 1974. (*Id.*). He visited the child sporadically and attended her first birthday party. (*Id.*). He knew at the time that Ms. Simington was receiving public assistance to support the child. (*Id.*). Since the child's first birthday party, Mr. Moore has "had no relationship, contact or communication directly with the child." (Motion for Summary Judgment, Ex. D, Aff. of John Moore). He has not contributed to the child's support. (*Id.*).

Ms. Simington applied for AFDC payments on July 9, 1974. She did not name Mr. Moore as the father because of his concern that he would be accused of statutory rape. (Resp. to Summary Judgment, Ex. 3, Aff. of Barbara Simington). Ms. Simington, however, later disclosed Mr. Moore's name. (*Id.*). As part of her AFDC application, Ms. Simington assigned her right to child support to the state welfare agency. The agency did not notify Mr. Moore that he had been named as the father. The state initiated proceedings in 1985 to have Mr. Moore declared to be the father of the child

and to recover past and future child support from him pursuant to the assignment.

C. Robert Dickinson.

Robert Dickinson "saw [Bonnie Cowden] socially during New Years Eve of 1980-1981." (Motion for Summary Judgment, Ex. B, Aff. of Robert Dickinson). He "saw" Ms. Cowden once or twice during the following week. (*Id.*). Approximately three weeks later Ms. Cowden told Mr. Dickinson that she suspected she was pregnant and that she was going for a pregnancy test the next day. (Resp. to Summary Judgment, Ex. 2, Aff. of Bonnie Cowden). Mr. Dickinson called her shortly thereafter and learned that she in fact was pregnant. (*Id.*). He told her to have an abortion, but she refused. (*Id.*).

After Ms. Cowden became pregnant, Mr. Dickinson broke off their relationship. (*Id.*). They still saw each other occasionally during her pregnancy, however. (*Id.*). A week after the child was born on October 13, 1981, Ms. Cowden called Mr. Dickinson to tell him about the new baby. (*Id.*). She testified:

> [My phone call] awakened him and he said he had no comment about his daughter. He said he would call me back but he never did. He never offered to pay child support. He never took the opportunity to be involved with Nancy [the child] in any way. In January or February of 1982, I sent him pictures of Nancy. He never responded to those either.

(*Id.*).

Ms. Cowden applied for AFDC payments. As part of the application, she named Mr. Dickinson as the father of her child and assigned her statutory child support rights to the state welfare agency. The agency did not notify Mr. Dickinson that he had been named as the child's father. The state initiated proceedings in 1985 to have Mr. Dickinson declared the child's father and to recover back and future child support

from him pursuant to the assignment.

REASONS FOR DENYING CERTIORARI

The putative fathers argue that the state's failure to notify each of them that they had been named as the father of an illegitimate child when the mother applied for public assistance violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Their primary claim is that the lack of notice prevented them from bonding with the children. The claim is somewhat hollow—if not frivolous—where, as here, each putative father knew that the child had been born, each knew that the mother considered him to be the father, and each repeatedly rejected the mother's attempts to have him support and nurture the child.

Not only are petitioners' federal claims insubstantial, but the Court also lacks jurisdiction to consider them. This brief first will address the two jurisdictional bars to hearing this case. It then will explain why this case does not present an issue that warrants granting certiorari.

I. The Court of Appeals' Decision Rests on an Independent and Adequate State Procedural Ground.

The state trial court granted summary judgment in favor of the putative fathers finding that "the lack of notice has deprived (the putative fathers) of [their] guarantees to due process and equal protection under the 14th Amendment to the United States Constitution and under the Oregon Constitution." (Order Granting Summary Judgment, App. B at 4). Unlike the trial court, the court of appeals did not reach the putative fathers' state or federal constitutional claims. Rather, it reversed solely on state procedural grounds.

The court of appeals began its analysis by noting that, as a matter of state law, "[s]ummary judgment may be granted where there is no genuine issue of material fact. . . ." *State ex rel. AFSD v. Kitchens*, *supra*, 93 Or. App. at 690. It held that "the issue of paternity [which each petitioner disputed] is

material in each case" and it reversed to allow the trial court to decide whether petitioners were in fact the biological fathers. *Id.* The court of appeals thus rested its holding solely on a question of state procedural law—whether a disputed issue of material fact made summary judgment improper. Although the putative fathers do not address how the court of appeals' decision could be said to raise a federal issue, their petition suggests two possibilities.

First, the putative fathers argue that the court of appeals held that they lacked standing to pursue their federal claims. (*See* Petition 12-13). The short answer to this argument is that the question whether a person has standing in state court is solely a state-law issue.[2] *See ASARCO Inc. v. Kadish*, ___U.S. ___, 109 S.Ct. 2037, 2045 (1989) (state-court standing requirements are separate from federal standing questions). Moreover, the putative fathers' characterization of the court of appeals' reasoning is inaccurate. The court of appeals' opinion does not hold that petitioners lack standing to raise federal issues.[3] It merely establishes the sequence in which the trial court should resolve their non-constitutional and constitutional claims. It recognizes that if, as the

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[2] If a state standing doctrine precluded a litigant from raising federal constitutional claims altogether, it would be subject to a due process attack or perhaps an argument that the state court procedural rule was inconsistent with the Court's role under the Supremacy Clause. As explained below, however, the Oregon Court of Appeals' opinion does not address questions of standing to raise federal issues nor does it preclude the putative fathers from having their federal claims considered in a meaningful fashion in state court.

[3] Petitioners assert that "the court, using a standing analysis, held that '[putative fathers] may not invoke claims of other persons who might be fathers.' " (Petition 12 quoting *State ex rel. AFSD v. Kitchens*, *supra*, 93 Or. App. at 691 (brackets in petition)). The portion of the opinion petitioners quote addresses petitioners' argument that the state was estopped to institute filiation proceedings because it had waited an undue amount of time. *See State ex rel. AFSD v. Kitchens*, *supra*, 93 Or. App. at 691. Although not completely clear, the court of appeals' use of *jus tertii* appears to be focused on a state question of estoppel.

putative fathers assert, they are not the biological fathers, then there is no need to reach the state and federal constitutional issues they raise. Directing the trial court to consider the issues in this sequence is consistent with well-established state practice. *See Lloyd Corp. v. Whiffen*, 307 Or. 674, ___ P.2d ___ (1989) (reiterating that Oregon courts should decide issues in a way that avoids, if at all possible, constitutional questions).

Second, the putative fathers argue that the court of appeals' opinion prevents them from having their constitutional claims considered in a meaningful way.[4] (Petition 19-20). They contend that because their constitutional claims go to the question of whether paternity should be established,[5] delaying consideration of those claims until after paternity is established renders their rights meaningless. (*Id.*). Petitioners' concerns are misplaced. The court of appeals' opinion only requires the trial court to decide first if petitioners are in fact the biological fathers. If they are, then the trial court is free to consider each father's constitutional claims in deciding whether it would be in the child's best interests to establish paternity.

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[4] Although the putative fathers do not identify the federal issue raised by this interpretation of the Oregon Court of Appeals' opinion, the question would be whether the procedural ground on which the state court judgment rests is itself a denial of due process. *See Michel v. Louisiana*, 350 U.S. 91 (1955) (state procedural requirement that objections to grand jury be raised within three days is consistent with due process).

[5] Although the putative fathers' argument is not completely clear, it appears to run as follows: The state, they contend, unconstitutionally deprived them of the opportunity to bond with their children by failing to notify them that the mothers named them as the fathers when they applied for public assistance. Because the children have gone so long without bonding, declaring the putative fathers to be the children's fathers at this point would disrupt the children's lives unduly. Accordingly, the putative fathers conclude, they have a constitutional right not to be named as the children's fathers.

Petitioners may disagree with the order in which the state court of appeals directed that their claims be decided. But requiring that the state trial court decide the underlying merits of the case before reaching petitioners' affirmative defenses does not present any federal constitutional issue. It presents only a question of state procedural law. This Court accordingly lacks jurisdiction.

II. Even If the State Court's Judgment Rests on Federal Grounds, the Judgment Is Not Final.

The Oregon Court of Appeals reversed the trial court's grant of summary judgment and remanded for trial. As a general rule, a state court judgment that contemplates further proceedings, as this judgment does, is not final for the purposes of 28 U.S.C. section 1257(3) (1982). *See Cox Broadcasting v. Cohn*, 420 U.S. 469, 479-85 (1975). Nor does this case fall within any of the four exceptions to the rule which the Court identified in *Cox Broadcasting*.

First, this is not a case in which the outcome of further state proceedings is preordained. *See id.* at 479; *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953). Petitioners have asserted that they are not the biological fathers, and the state court of appeals found that this was a disputed issue of material fact that required a trial on the merits.

Second, this is not a case in which the federal issue will remain regardless of the outcome of the trial on remand. *Cox Broadcasting v. Cohn, supra*, 420 U.S. at 480; *Radio Station WOW v. Johnson*, 326 U.S. 120, 124-27 (1945) (subsequent accounting could not affect federal issue). If the state fails to prove that petitioners are the biological fathers, then there will be no need to reach the federal constitutional issues petitioners raise. Moreover, as this Court has recognized, the Oregon courts typically decide state constitutional issues before reaching federal constitutional questions. *See Employment Div., Department of Human Res. v. Smith*, 485 U.S. 660,

108 S.Ct. 1444, 1447 & n 9 (1988). If, on remand, petitioners prevail under the state constitution, then the state courts will not reach the federal constitutional issues. *See Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 369 n 12, 723 P.2d 298 (1986), *appeal dismissed*, 480 U.S. 942 (1987); *State v. Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983).

Third, this is not a case in which the federal issue will necessarily be mooted on remand. *Cox Broadcasting v. Cohn*, *supra* 420 U.S. at 481; *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 159-64 (1973). If the state proves that the putative fathers are the biological fathers and if the putative fathers have no valid state constitutional claim, then the trial court will have to reach the federal constitutional claims.

Finally, this is not a case in which the failure to grant review immediately would seriously erode federal policy. *See Cox Broadcasting v. Cohn*, *supra*, 420 U.S. at 482-83; *Construction Laborers v. Curry*, 371 U.S. 542, 550 (1963). Petitioners' claims do not implicate questions of national labor policy, as the pre-emption issue in *Curry* did. Rather, the due process issues of timely notice raised here are much closer to the due process claims raised in *Miner v. Gillette Co.*, 459 U.S. 86 (1982), which the Court dismissed for lack of jurisdiction because there was no final judgment.[6] Moreover, because, as explained below, the particular federal questions petitioners raise are not substantial, declining to grant certiorari now will not seriously erode federal policy.

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[6] In *Miner*, the defendant petitioned for certiorari from an Illinois Supreme Court decision which held that a state court did not have to have personal jurisdiction over all plaintiffs to certify a non-resident plaintiff class. *Miner v. Gillette Co.*, 87 Ill.2d 7, 428 N.E.2d 478 (1981). The decision was not final because the state supreme court had remanded to allow the trial court to decide whether such a class would be manageable. *See* 428 N.E.2d at 484.

The Court later decided the question when it was properly presented in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).

III. The Putative Fathers' Due Process Claims Are Insubstantial.

The putative fathers' constitutional analysis identifies why, in their view, the state's action impinges on a protected liberty interest and a protected property interest. (*See* Petition 33-41). The state will respond to their arguments in turn.

A. Protected Liberty Interests.

The putative fathers rely on *Lehr v. Robertson*, 463 U.S. 248 (1983), to argue that they have a constitutionally protected "opportunity interest" to bond with the children. (Petition 33-35). *Lehr* does not support petitioners' claims. In *Lehr*, the state terminated the father's interest by allowing the child to be adopted. In this case, the state is not terminating petitioners' interests. It is seeking to prove that petitioners are in fact the children's biological fathers. The state thus would appear to be advancing petitioners' "opportunity interests," not frustrating them.[7]

The putative fathers argue, however, that the problem is that the state has not done enough. They claim that because the state failed to notify them that the mothers had identified them as the fathers, petitioners lost their only meaningful opportunity to form bonds with the children. (*See* Petition 16-17). They argue:

> Through these delays, and the withholding of Title IV-A notice, states may suppress information from putative fathers in such manner that they are not

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[7] *Lehr* does not support petitioners for a second reason. The Court recognized in *Lehr* that unwed fathers who have developed a relationship with the child have a strong liberty interest, while persons who are merely biological fathers have only a minimal liberty interest in the opportunity to form a relationship with their child. 463 U.S. at 260-64. *Lehr* does not suggest, however, that persons who are *not* the biological father enjoy any constitutionally protected interest. It is, thus, difficult to see how petitioners can deny that they are the biological fathers and at the same time claim a constitutionally protected liberty interest.

> encouraged to seek timely legal advice. This means that they may, as has happened to these putative fathers, lose the opportunity to assume their responsibilities as parents in a timely fashion.

(Petition 16). The short answer to this argument is that the Due Process Clause does not require the state to take steps to increase a father's opportunity to bond with his children. *See DeShaney v. Winnebago Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1003 (1989). It only protects the termination or deprivation of that opportunity. *See id*; *Lehr v. Robertson*, *supra*.

In any event, even if the Due Process Clause imposes such an obligation on the state, the absence of any official notice was harmless on the facts of this case. Each of these putative fathers knew that the mother had given birth to a child, each knew that the mother claimed that the child was his, and each failed to support or nurture the child. Indeed, Mr. Kitchens did not come to see his son even though Mr. Kitchens' family told him that the boy was so sick he nearly died. If these putative fathers have lost the opportunity to "assume their responsibilities as parents in a timely fashion," as they assert in their petition, they can hardly lay the blame at the state's door.[8]

Finally, even if the state improperly failed to notify these putative fathers in time to allow them to bond with their children, that does not preclude the state from now seeking to establish the children's paternity. As the Court recognized in *Rivera v. Minnich*, 483 U.S. 574, 107 S.Ct. 3001, 3005 (1987), "the primary interest of the defendant [in a filiation proceeding] is in avoiding the serious economic consequences that

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[8] The putative fathers' argument to the contrary rests on the factual assumption that they did not know about the children. (*See, e.g.*, Petition 48). Because, however, this case arises on the putative fathers' motions for summary judgment, the facts must be taken in the light most favorable to the state. The facts have been set out in that light above.

flow from a court order that establishes paternity and its correlative obligation to provide support for the child." The fact that the putative father has not previously had an opportunity to bond with his child does not preclude the state from asking the father to assume his share of the financial responsibility.[9]

B. Protected Property Interests.

Petitioners argue:

> Putative fathers have a constitutional due process property right to Title IV-A notice [notice when the mother applies for AFDC payments], because of their entitlement to rectify the needs of the children by coming forward and raising the children, or to mitigate "the serious economic consequences" by beginning to pay some support for the children.

(Petition 41). The short answer to this argument is that any time these putative fathers wanted to rectify the needs of their children or mitigate the serious economic consequences by beginning to pay child support, they could have done so. Each putative father knew that the mother considered him to be the father. Nothing prevented these putative fathers from "coming forward" and paying child support. On these facts, the absence of official notice that each of these petitioners had been identified as the father when the mother applied for AFDC payments is immaterial to the loss petitioners allegedly sustained.

The petition also suggests that the failure to notify petitioners implicated a protected property interest because child

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[9] If, as the putative fathers suggest, they are concerned about disrupting the children's existing relationships, *see* note 5 *supra*, their concern is misplaced. The existence of an order establishing paternity simply imposes a financial obligation on a parent. It does not require that parent to form a relationship with the child or to take actions that would disrupt the child's world in any way. A father who is concerned that his presence would be detrimental to the child's best interests, as these putative fathers claim to be, can simply send in his money and not disturb his child's life.

support was accruing without the petitioners' knowledge. The difficulty with this suggestion is that Oregon law imposes a duty of support on all parents. Or. Rev. Stat. § 109.010 (1987); *Haxton and Haxton*, 299 Or. 616, 705 P.2d 721 (1985). Under state law, the duty to pay child support and the resulting financial obligation began accruing the moment the child was born. *Id.* The mother's application for public assistance and her assignment of the right to recover child support to the state did not change the nature of the underlying obligation. *State ex rel. AFSD v. Lester*, 45 Or. App. 389, 392, 608 P.2d 588 (1980); *Butchko v. Butchko*, 43 Or. App. 199, 203, 602 P.2d 672 (1979).[10] It merely changed the payee. The identity of the payee is not a protected property interest for which the Due Process Clause requires notice.[11]

IV. Equal Protection.

The putative fathers argue that the state notifies married fathers but not unmarried fathers when a mother applies for AFDC payments. (Petition 43). They assert that this distinc-

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[10] When, as in this case, the state has provided AFDC payments, the state could either assert the mother's right to child support pursuant to the assignment or seek to recover a "state debt" for the amount paid, Or. Rev. Stat. § 416.410(1) (1987). The former claim allows the state to recover only what the father owes for child support, which may well be less than the AFDC payments made. The latter claim allows the state to recover all the payments it made for the benefit of the child. In this case, the state is only seeking to enforce the mothers' child support rights that had been assigned to the state. It is not seeking to recover a state debt pursuant to Or. Rev. Stat. § 416.410(1) (1987).

[11] As a matter of state law, an assignee may protect his or her interests by notifying the debtor of the assignment. *See State Farm Ins. v. Pohl*, 255 Or. 46, 50, 464 P.2d 321 (1970). Absent notice, any payment the debtor makes to the assignor is credited against the amount now owed the assignee. *Meier v. Hess* 23 Or. 599, 603, 32 P. 755 (1893); *State ex rel. Hansen v. McKay*, 31 Or. App. 631, 636, 571 P.2d 166 (1977). While the assignee thus may have an incentive to notify the debtor of the assignment, the failure to do so does not invade any constitutionally protected property interest the debtor enjoys.

tion violates the Equal Protection Clause. This argument lacks merit for three reasons. First, the state does not distinguish between married and unmarried fathers. Second, the "notice" given certain fathers is solely to determine eligibility for AFDC payments. Finally, the distinction the state draws is rationally based on federal statutes, federal regulations, and this Court's decisions.

Before turning to the putative fathers' arguments, it is helpful to explain the background against which the state acts. The AFDC program provides assistance to needy children. In determining the needs of a child who applies for AFDC payments, the statutes direct cooperating states to consider "any other income and resources [of the child]." 42 U.S.C. § 602(a)(7) (1982). The parent's income is one source of funds that must be taken into consideration. 45 C.F.R. § 233.90 (1988). The question, however, of who is a parent for the purposes of determining AFDC eligibility has proved complex.

The Court has recognized that the term "parent," as used in the AFDC statutes and regulations, includes "only those persons with a legal duty of support." *King v. Smith*, 392 U.S. 309, 327 (1968). In *Lewis v. Martin*, 397 U.S. 552, 559 (1970), however, the Court explained that the "legal duty of support" identified in *King* was a necessary but not sufficient condition for qualification as a "parent." The Court upheld the Department of Health, Education and Welfare's determination that even though some persons might have a legal obligation to support a child, the fulfillment of that obligation was "sufficiently uncertain in the absence of the marriage tie" to require that that person's income automatically be considered in determining the child's eligibility for AFDC payments. *Id.* In effect, the Court held that in deciding an applicant's eligibility

for AFDC, a state was only required to consider the income from married parents and those unmarried parents whose legal support obligations were sufficiently certain.

The evidence brought out in opposition to the summary judgment motion is consistent with this Court's cases and Department of Health and Human Services' regulations. The evidence demonstrated that when an applicant applies for AFDC payments, the state agency requests all married parents and some unmarried parents to report how much money they contribute monthly to the household's income. (Resp. to Summary Judgment, Ex. 4, Aff. of Kathie Blair). The agency's practice recognizes that although all married fathers have a clearly established legal obligation to support their children, the obligation of only some unmarried fathers (such as those whose paternity has been acknowledged or established) may be sufficiently certain to require consideration of their income in determining the child's eligibility for AFDC payments.

In light of this background, the putative fathers' equal protection claims are meritless. The state does not distinguish on the basis of marital status. It distinguishes on the basis of the certainty of the father's fulfilling his legal obligation of support. As the Court recognized in *Lewis*, this class will include all married parents and a small percentage of unmarried ones. Because the state does not classify on the basis of even an arguably suspect classification, *compare Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978) (law that significantly interferes with right to marry subject to "rigorous scrutiny"), the only question is whether the distinction is a rational one. *New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam). It is difficult to see how a distinction that complies with federal regulations that have been upheld by the Court lacks a rational basis.

Finally, even if there were some question of an equal protection violation, the putative fathers in this case have not been injured by any lack of notice. The notice the agency sends out would have told them only that the mother had applied for AFDC payments on behalf of a named child and that the "case record indicates that you may have an interest in the listed person(s)." (Resp. to Summary Judgment, Ex. 4, Attachment to Aff. of Kathie Blair). This "notice" would not have told these putative fathers any relevant information they did not already know.

V. The Procedure Established by the Court of Appeals' Decision Does Not Deprive the Putative Fathers of Due Process.

The final argument the putative fathers make is that under the court of appeals' decision

> loss of [their] constitutional rights may not be asserted by putative fathers as available, meritorious defenses when the courts determine the factual issue of paternity in simplified, state-initiated Title IV-D filiation proceedings.

(Petition 55). As explained above, the putative fathers misread the court of appeals' opinion. The opinion merely requires that the trial court first decide whether petitioners are the children's biological fathers before considering petitioners' affirmative defenses. The court of appeals' opinion does not preclude the trial court from subsequently considering petitioners' constitutional claims in deciding whether to enter an order establishing the paternity of the children.

CONCLUSION

For the reasons set out above, the petition for certiorari should be denied.

Respectfully submitted,
DAVE FROHNMAYER
Attorney General of Oregon
JAMES E. MOUNTAIN, JR.
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
TIMOTHY A. SYLWESTER
RIVES KISTLER
Assistant Attorneys General
Counsel for Respondent

Supreme Court, U.S.
FILED
AUG 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1677

In the Supreme Court
of the United States

OCTOBER TERM, 1988

RONNIE OSCAR KITCHENS, et al.,
Petitioners,

v.

STATE OF OREGON ex rel.
ADULT AND FAMILY SERVICES DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

BRIEF FOR PETITIONERS IN REPLY

PHILIP FREDERICK SCHUSTER, II
Counsel of Record
ROGER FREDRICK DIERKING
Counsel for Petitioners
1500 N.E. Irving Street, Suite 540
Portland, OR 97232
(503) 231-7765

JULY 31, 1989

STEVENS-NESS LAW PUB. CO., PORTLAND, OR 97204 898

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I. INTRODUCTION

The State's Response does not address the substantial conflicts created between the Oregon Court of Appeals' decision and Congress' goal of expedited establishment of paternity, consistent with the child's best interests (Petition 24). The State's omission emphasizes why petitioners' federal Title IV-A notice and Title IV-D defense claims are of national importance: because an adjudication of paternity "touches (the child's) interests far beyond the recovery of support payments." State ex rel AFSD v. Tuttle, 304 Or. 270, 275, 744 P.2d 990, 992 (1987); Michael H. v. Gerald D., ___ U.S. ___, 109 S.Ct. 2333, 2339 (1989).

While the State concedes that, under Oregon law, the putative father's "financial obligation (begins) accruing the

moment the child was born" (Response 14), the State refuses to acknowledge that a Title IV-A notice may prompt earnest concern for this "financial obligation," because many of these men are either "'unconscious of the birth'" or lack any "'ties to the mother.'" Lalli v. Lalli, 439 U.S. 259, 269 (1978). Despite the State's re-examination of the facts to portray petitioners as unworthy of having any constitutional rights, because of their private differences with, or lack of ties to, the mothers, there are no disputed issues of material fact with respect to petitioners' federal claims. This Court, therefore, need not re-examine the findings of fact of the state courts. Portland R., L. & P. Co. v. Railroad Commission, 229 U.S. 397, 411-412 (1913).

The State's resistance to Title IV-A notice as a mechanism to achieve Congress' goal of expedited establishment of paternity and Child Support Enforcement ("CSE") recapture (see, Family Support Act of 1988, Pub. L. 100-485, §§ 111, 121), further highlights a national problem of state reluctance to expedite Title IV-D paternity adjudications. See, Notice of Proposed Rulemaking, OCSE, Dept. of H.H.S., Federal Register, 15876, 15888-89, (Vol. 54, No. 74, April 19, 1989). It is, therefore, not surprising that the State of Oregon, while urging the appellate court below for a ruling on the merits, State ex rel AFSD v. Kitchens, 93 Or.App 685, 691, 763 P.2d 1196, 1199 (1988), now seeks to avoid a national and uniform decision on the merits by arguing that petitioners' federal claims are insub-

stantial and that "this Court lacks jurisdiction."

II. THE OREGON COURT OF APPEALS JUDGMENT IS FINAL -- A REMAND WILL EXTINGUISH PETITIONERS' FEDERAL CLAIMS

This case falls within the third exception to the rule of finality which this Court identified in Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 481 (1975):

> ". . . where . . ., if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, the governing law would not permit him again to present his federal claims for review."

Petitioners' federal claims will not survive for this Court to review, regardless of the outcome of the proceedings on remand. If the trial court finds that petitioners are not the biological fathers, the federal claims will be moot. If, on the other hand, paternity is estab-

lished, then the petitioner's federal claims will vanish.

With respect to petitioners' claim to assert Title IV-D defenses, the "law of the case" has established that only when an order is entered establishing paternity, may petitioners "bring into play" their federal claims. State ex rel AFSD v. Kitchens, supra, 763 P.2d at 1198. Contrary to the State's assertions (Response 8, 17), the plain meaning of the decision is that once the factual and statutory "issue of paternity" is decided (see, ORS 109.155(1) - Petition App. D-14), the state court is absolutely not free to consider whether or not fathers' constitutional claims will now undo the order establishing paternity. An adjudication of the issue of paternity, then, defeats the very basis for petitioners'

federal claim of a right to assert defenses to the adjudication of paternity itself.

As to petitioners' remaining federal Title IV-A notice claim, once paternity is established, the trial court has the option to either (1) rule that only adjudicated, biological fathers are entitled to Title IV-A notice or (2) rule that all identified, putative fathers are entitled to Title IV-A notice. Option 1 leads to an absurd, illogical result and eliminates the notice remedy outright because no practical means exist at the Title IV-A stage for differentiating between putative and biological fathers. Option 2 is also precluded by the "law of the case" which holds that putative fathers, as such, have no constitutional right to Title IV-A notice. State ex rel AFSD v. Kitchens,

supra, 763 P.2d at 1198. In addition, the trial court held that the absence of Title IV-A notice, together with the passage of a "substantial period of time ... with no association," operates as a constitutional time bar to state-initiated filiation proceedings (Petition 11-12). Assertion of such a federal "constitutional time bar" claim would also be prevented under governing state law. See, State ex rel AFSD v. Keusink, 69 Or. App. 324, 326, 684 P.2d 1239 (1984) review denied 298 Or. 238, 691 P.2d 482 (1984).

When a case is in this procedural posture, this Court has considered it sufficiently final to justify review, consistent with this Court's "pragmatic" approach normally taken to finality questions, Cox Broadcasting Corporation v. Cohn, supra, 420 U.S. at 486:

"...[T]he (trial) court could agree that (putative fathers may assert their federal constitutional claims after paternity is adjudicated to undo an order establishing paternity). But ...the (Oregon appellate) courts already have considered and resolved this issue in its earlier proceedings; if the (petitioners) were to raise it again in a new set of appeals, the courts below would simply reject the claim(s) under the law of the case doctrine. Law of the case principles are not a bar to this Court's jurisdiction, of course, and thus the (State) apparently would require the (petitioners) to raise a fruitless (federal) claim in the trial court, the (Court of Appeals), and the (Oregon) Supreme Court still another time before we re-grant certiorari on the question that is now before us.

The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures. Based on the unusual facts of this case, the justifications for the finality doctrine--efficiency, judicial restraint, and federalism (citation omitted)--would be ill-served by another round of litigation on an issue that has been authoritatively decided by the highest state court." Pennsylvania v. Ritchie, 480 U.S. 39, 48-49, n. 7 (1987) (emphasis added).

This case also falls within the fourth Cox exception to finality because "reversal ... on the federal (Title IV-A notice) issue would be preclusive of any further litigation on the relevant (state-initiated filiation) cause of action" and because a failure to grant review, immediately, will "seriously erode federal policy." Cox Broadcasting Corporation v. Cohn, supra, 420 U.S. at 482-483.

The unreviewed Oregon Court of Appeals' decision, by leaving unanswered the Title IV-A notice question, leaves an uneasy and unsettled constitutional posture that "might seriously erode federal policy in the area of (CSE recapture)...(and have) important implications for the regulation of (CSE programs) in other States." Goodyear Atomic Corp. v. Miller, ___ U.S. ___, 108 S.Ct. 1704, 1709 (1988).

III. THE STATE APPELLATE DECISION DOES NOT REST ON AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND.

The summary judgment "sequence," which the State claims is independent and adequate, does not allow putative fathers, if they deny they are the biological fathers, the right to assert federal constitutional claims. The State judicial "sequence" for handling federal claims is inadequate because it conflicts with federal standing principles applied to putative fathers and, because, unlike the statutory presumption involved in Michael H. v. Gerald D., supra, 109 S.Ct. at 2340, it denies petitioners due process of law. (Petition 54-64).

Although this Court has long recognized that it must, sua sponte, refuse jurisdiction where standing is not present, see, e.g., Juidice v. Vail, 430 U.S.

327, 331 (1977), it has never done so where putative fathers have asserted federal claims. See, Lehr v. Robertson, 463 U.S. 248, 250 n.3 (1983); Quilloin v. Walcott, 434 U.S. 246, 252-255 (1978); Stanley v. Illinois, 405 U.S. 645, 647-650 (1972). In Michael H. v. Gerald D., supra, 109 S.Ct. at 2338, 2343, this Court did not, sua sponte, question Michael H.'s standing as a putative father to assert his federal due process claims nor did this Court require his biological paternity to be adjudicated as a pre-condition to this Court's assuming jurisdiction.

Where the state court holds that a party lacks standing to assert constitutional challenges because the "issue of fact" of paternity must, first, be adjudicated, and where numerous precedents of this Court hold that such an adjudication

of the "issue of fact" is unnecessary, the state grounds are not adequate. See, e.g., Staub v. City of Baxley, 355 U.S. 313, 319 (1958).

The State's constitutional basis for its decision, that petitioners have not been deprived of any liberty or property interest under either the federal or state constitution, State ex rel AFSD v. Kitchens, supra, 763 P2d at 1198, also does not constitute an independent and adequate state ground. The State has even conceded that the separation of state from federal issues is "not completely clear" (Response 7, n. 3), justifying the presumption that the federal issue predominates and that the state ground is not independent and adequate, Michigan v. Long, 463 U.S. 1032, 1040-1044 (1983), because "the decision below did not divorce the state constitu-

tional issue from the questions of federal law." ASARCO Inc. v. Kadish, ___ U.S. ___, 109 S.Ct. 2037, 2049 (1989).

The State's non-federal ground of estoppel is also not independent and adequate. First, a rule of Oregon summary judgment procedure has been used unreasonably to avoid a decision relative to federal rights:

> "(Appellate courts) do not rely on what may or may not be admitted in the briefs on appeal in determining the propriety of summary judgment but only the pleadings, depositions, affidavits and admissions on file and considered by the trial court." ORCP 47C; Falkenstein v. Pishioneri, 80 Or.App. 203, 206, 720 P.2d 1341, 1342-1343 (1986) (emphasis added).

Here, estoppel principles were never even considered by the trial court nor did they form the basis for the trial court's ruling from which an appeal was taken by the State. (Petition App. B-1 - B-11). Yet,

the Court of Appeals, referring to petitioners' brief below, based its decision upon state estoppel principles. State ex rel AFSD v. Kitchens, supra, 763 P2d at 1198. Because the Court of Appeals has not "strictly or regularly followed" its own procedural requirement "in determining the propriety of summary judgment," the state ground is not adequate. Hathorn v. Lovorn, 457 U.S. 255, 262-265 (1982); Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

Secondly, the Court of Appeals utilized federal principles of standing in the context of its discussion of estoppel principles to establish a state procedural summary judgment "sequence". See, Warth v. Seldin, 422 U.S. 490, 498-501 (1975) (discussion of federal standing principles) as adopted in Kelly v. Silver, 25

Or.App. 441, 452, 549 P.2d 1134, 1140-41 (1976), as cited authority in State ex rel AFSD v. Kitchens, supra, 763 P.2d at 1198. Since the Court of Appeals' decision interweaves federal standing principles into the context of its summary judgment procedure to establish a trial court "sequence" for handling petitioners' federal claims which preclude petitioners from raising their federal constitutional claims before paternity is adjudicated, the decision does not rest upon independent and adequate state grounds. See, Oregon v. Kennedy, 456 U.S. 667, 671 (1982); Staub v. City of Baxley, supra, 355 U.S. at 319; ASARCO Inc. v. Kadish, supra, 109 S.Ct. at 2049.

IV. THE RELATIONSHIP OF CURRENT DECISIONS OF THIS COURT TO PETITIONERS' FEDERAL CLAIMS, WHICH THE STATE FAILED TO ADDRESS, DEMONSTRATES WHY PETITIONERS' FEDERAL CLAIMS ARE SUBSTANTIAL.

This Court may now apply its analysis of liberty interest, formulated in Michael H. v. Gerald D., supra, 109 S.Ct. at 2341, to determine if the State has a duty to give Title IV-A notice to putative fathers where the State, instead of terminating the parent-child bond, seeks to create that bond. If "the asserted liberty interest be rooted in history and tradition", Id., at 2342, and that "societal tradition," culminating in statutes and case law, has expected a putative father to nurture and support his child as soon as possible, consistent with the child's best interests, then this Court may decide that the State owes a constitutional duty to protect that "fundamental" liberty interest as soon as the State interacts with the welfare family.

Recently, this Court reviewed the State's duty owed to family members in DeShaney v. Winnebago County DSS, ___ U.S. ___, 109 S.Ct. 998 (1989). There, the Court held that the State has no due process duty to affirmatively protect family members from the private actions or injuries of third persons. Contrastingly, the issue, here, is whether the Fourteenth Amendment places "a limitation on the State's power to act" to establish paternity and support obligations, when the State becomes directly involved with the welfare family and it is within the State's control "to prevent government 'from abusing (its) power, or employing it as an instrument of oppression,'" Id. at 1003, by indefinitely withholding from putative fathers notice of the State's

intention to establish their paternity and accruing support obligations.

The coinciding equal protection issue is whether the State's policy of withholding Title IV-A notice from putative fathers withstands strict scrutiny, where the discrimination is based upon the child's illegitimacy, Gomez v. Perez, 409 U.S. 535, 538 (1973), or even if the State's policy "pursues a legitimate end by rational means." Michael H. v. Gerald D., supra, 109 S.Ct. at 2346. The State's goal is to determine both need and dependency, or "continued absence." (Aff. of Kathie Blair - App. B-3). Yet, the State offers no rational explanation for withholding notice from putative fathers, where the dependency of all illegitimate children, whose putative fathers have been located, is just as much an eligibility

issue as is the dependency of legitimate children whose married parents are divorcing and absent from the home.

The exclusion of putative fathers from decisions involving mothers' reproductive rights, on the one hand, and their delayed involvement, on the other hand, in matters of support obligations and responsibilities for their out-of-wedlock children, has left hundreds of thousands of putative fathers in a state of conflict and confusion with their children. Significantly, this Court has recently expanded the role given to states to regulate reproductive rights and to protect life, Webster v. Reproductive Health Services, ___ U.S. ___, 57 LW 5023, 5030-31 (July 3, 1989), and may continue to do so next term. Reflecting this greater responsibility being given to states, the

Court may require the State to notify putative fathers when "state action" impacts the welfare family, to ensure that the potentiality for, and sanctity of, familial bonding and decision making will not be unduly delayed by abusive and oppressive government omissions.

Petitioners' federal claims, therefore, involve substantial federal questions impacting family life -- matters of current concern to this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Philip F. Schuster, II
Counsel of Record
Roger F. Dierking
Counsel for Petitioners

July 31, 1989

APPENDIX A

APPENDIX A

OREGON RULES OF CIVIL PROCEDURE (ORCP)
SUMMARY JUDGMENT - RULE 47

"...C. Motion and proceedings thereon. The The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

APPENDIX B

APPENDIX B

AFFIDAVIT OF KATHIE BLAIR:

"I am an Assistance Worker II at the S.E. Portland Adult and Family Services Division (AFS) office. I have been with AFS since 1976. As part of my job, I interview parents or other relatives who apply for aid to families with dependent children (AFDC). Under state and federal law, we must determine whether the applicant is eligible for assistance. Such eligibility depends on, among other things, whether the child has been deprived of parental support. Therefore, if the basis of the application is an absent parent, we must determine whether the parent is providing any support, in what manner, and how much. We therefore try to contact the absent parent. This contact is solely for purposes of deter-

mining the applicant's eligibility for AFDC.

"Our usual procedure is to send the absent parent an AFS 412 letter, a copy of which is [included herein as Appendix A]. We do not 'notify' an absent parent in the sense of informing him or her that the child seeks public assistance and that the absent parent will incur liability accordingly.

"Since at least 1981, on a case by case basis, we may send an AFS 412 letter to an unmarried father if the mother designates him as the absent parent when she applies for assistance. Again, the primary purpose is to determine whether the alleged father has been and still is providing any support that could affect the mother's and the child's eligibility. Our goal is to determine income and potential

resources to the child, as well as continued absence."

SEP 12 1989

No. 88-1677

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITIONERS' SUPPLEMENTAL BRIEF

PHILIP FREDERICK SCHUSTER, II
Counsel of Record
ROGER FREDRICK DIERKING
Counsel for Petitioners
1500 N.E. Irving Street, Suite 540
Portland, OR 97232
(503) 231-7765

SEPTEMBER 12, 1989

STEVENS-NESS LAW PUB. CO., PORTLAND, OR 97204 899

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I. INTRODUCTION

New federal regulations, establishing parent location and paternity establishment timeframes, which become effective October 1, 1990, were enacted August 4, 1989 by the Department of Health and Human Services, pursuant to the Family Support Act of 1988. Pub. L. No. 100-485, 102 Stat. 2346 (1988); Final Rule, 54 Federal Register 32284 (August 4, 1989).

These new regulations emphasize the national importance of putative fathers' constitutional Title IV-A notice claim (Petition 33-54) as well as their constitutional claim to assert meritorious defenses where Title IV-D proceedings have been unduly delayed. (Petition 54-64). During these prolonged time spans, changes can occur in the circumstances of putative fathers, as well as the children, making

establishment of paternity inconsistent with the childrens' best interests.

The parent location timeframe requires states to diligently proceed to locate putative fathers within 75 calendar days after determining that location is necessary. 45 CFR § 303.3(a)(b)(3) (App. A-1). The establishment of paternity time-frame requires states to file paternity actions within 90 calendar days after locating the putative fathers. 45 CFR § 303.5(a)(1) (App. A-2).

II. NEW FEDERAL REGULATORY TIMEFRAMES FOR ESTABLISHMENT OF PATERNITY DEMONSTRATE THE NATIONAL IMPORTANCE OF PETITIONERS' CLAIMS AS WELL AS THE SUBSTANTIAL CONFLICTS EXISTING BETWEEN STATE AND FEDERAL AUTHORITIES.

Need for early involvement of putative fathers in the Title IV-A and Title IV-D proceedings was strongly expressed to the states by the Department

of Health and Human Services responses to comments on the proposed regulations:

> "Response: While we have not required separate timeframes for uncontested cases, we strongly urge States to attempt to establish paternity by voluntary acknowledgment immediately upon location of the alleged father." Establishment of Paternity - Section 303.5, para. 1, supra, 54 FR at 32300.

> "Response: * * * This will allow States to serve process on the putative father as soon as possible after the child is born when the putative father is more likely to be responsive because the timeframe for paternity establishment will not begin until the child is old enough for a blood test. * * *" Establishment of Paternity - Section 303.5, para 3, supra 54 FR at 32301. (emphasis added).

The timeframes indicate a strong federal policy -- in harmony with the federal paternity statute of limitations, 42 U.S.C. § 666(a)(5) -- that societal goals will best be served by quick involvement of putative fathers in this cooperative federal-state AFDC program,

rather than by the past pattern of the filing of hundreds of thousands of state-initiated paternity actions, delayed at the states' discretion, until any time before the children reach 18 years of age.

The explicit federal policies for expedited establishment of paternity belie State arguments that the petitioners' constitutional claims for timely Title IV-A notice are insubstantial. These policies also conflict with the State's position that the State, within the context of this federal-state program seeking to create the parent-child bond, has no responsibility to take steps to increase a father's opportunity to bond with his child at a time when he is most responsive to that opportunity, rather than at a later time when the opportunity may no longer exist. (See, Response 11-12).

The federal timeframes strengthen the basis for putative fathers' federal constitutional claim that timely notice to putative fathers in state Title IV-A proceedings will assist children born out-of-wedlock, because putative fathers will be "more likely to be responsive" to their children's needs when putative fathers' constitutional rights to notice are recognized and protected sooner by the State. In so doing, the new federal regulations also provide additional basis for petitioners' claim of a constitutional right to assert meritorious defenses to state-initiated filiation proceedings, where delayed establishment of paternity may not be in the child's best interests. (Petition 16-17).

CONCLUSION

The Petition for Writ for Certiorari should be granted.

Respectfully submitted,

Philip F. Schuster, II
Counsel of Record
Roger F. Dierking
Counsel for Petitioners

September 12, 1989

APPENDIX A

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45 CFR 303.3(a)(b)(3), 54 FR 32310 (August 4, 1989):

"(a) Definition. 'Location' means information concerning the physical whereabouts of the absent parent, or the absent parent's employer(s), other sources of income or assets, as appropriate, which is sufficient and necessary to take the next appropriate action in a case.

"(b) For all cases referred to the IV-D agency or applying for services under § 302.33 of this chapter, the IV-D agency must attempt to locate all absent parents or sources of income and/or assets when location is necessary to take necessary action. Under this standard, the IV-D agency must:

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"(3) Within no more than 75 calendar days of determining that location is necessary, access all appropriate location sources, including transmitting appropriate cases to the Federal PLS, and ensure that location information is sufficient to take the next appropriate action in a case;"

45 CFR 303.5(a)(1), 54 FR 32310 (August 4, 1989):

"(a) For all cases referred to the IV-D agency or applying for services under §§ 302.33 of this chapter in which paternity has not yet been established:

"(1) The IV-D agency must, within no more than 90 calendar days of locating the alleged father, file for paternity establishment or complete service of process to establish paternity (or document unsuccessful attempts to serve process, in accordance with the State's guidelines defining diligent efforts under §§ 303.3(c)), whichever occurs later in accordance with State procedures for paternity establishment."